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47
~~ORIGINAL~~
No. 2591

Docketed

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

SMITH-POWERS LOGGING CO.

A Corporation, and

C. A. SMITH LUMBER & MANUFACTURING CO.

A Corporation,

Appellants.

VS.

E. W. BERNITT and

VICTOR WITTICK,

Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the District Court of the
United States for the District of Oregon.

RECEIVED

44-10115
MAR 30 1915

F. D. MONCKTON,
CLERK.

Filed

MAR 30 1915

F. D. Monckton,
Clerk.

No. _____

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

SMITH-POWERS LOGGING CO.

A Corporation, and

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

	Page
Answer.....	48
Appeal, Assignment of Errors on.....	99
Appeal, Bond on.....	111
Appeal, Citation on.....	1
Appeal, Petition for.....	97
Appearance.....	25-37
Appointment of Special Deputy.....	20
Assignment of Errors.....	99
Bond on Appeal.....	111
Bond on Removal.....	32-43
Certificate to Transcript on Removal.....	47
Citation on Appeal.....	1
Complaint.....	2
Decree, Final.....	86
Errors, Assignment of.....	99
Evidence.....	115
Evidence, Stipulation as to.....	114

EXHIBITS:

Plaintiff's Exhibit No. 1.....	117
Plaintiff's Exhibit No. 2.....	121
Plaintiff's Exhibit No. 3.....	124
Plaintiff's Exhibit No. 4.....	124
Plaintiff's Exhibit No. 5.....	125
Plaintiff's Exhibit No. 6.....	128
Plaintiff's Exhibit No. 7.....	129
Plaintiff's Exhibit No. 8.....	139
Plaintiff's Exhibit No. 9.....	149-468

Index.	Page
EXHIBITS—Continued:	
Plaintiff's Exhibit No. 10.....	154-469
Plaintiff's Exhibit No. 11.....	165
Plaintiff's Exhibit No. 12.....	169
Plaintiff's Exhibit No. 13.....	171
Plaintiff's Exhibit No. 14.....	192-474
Plaintiff's Exhibit No. 15.....	193
Plaintiff's Exhibit No. 16.....	196
Plaintiff's Exhibit No. 17.....	200
Plaintiff's Exhibit No. 18.....	205
Plaintiff's Exhibit No. 19.....	207
Plaintiff's Exhibit No. 20.....	207
Plaintiff's Exhibit No. 21.....	210
Plaintiff's Exhibit No. 22.....	211
Plaintiff's Exhibit No. 23.....	212
Plaintiff's Exhibit No. 24.....	213
Plaintiff's Exhibit No. 25.....	214
Plaintiff's Exhibit No. 26.....	215
Plaintiff's Exhibit No. 27.....	227
Plaintiff's Exhibit No. 28.....	231
Plaintiff's Exhibit No. 29.....	475
Plaintiff's Exhibit No. 30.....	396-484
Plaintiff's Exhibit No. 31.....	413-414
Defendant's Exhibit A.....	246-486
Defendant's Exhibit B.....	254
Defendant's Exhibit C.....	304
Defendant's Exhibit D.....	319-320
Defendant's Exhibit E.....	322
Defendant's Exhibit F.....	347-490
Defendant's Exhibit G.....	348-492

Index.	Page
EXHIBITS—Continued:	
Defendant's Exhibit H.....	361-362
Defendant's Exhibit I.....	403-404
Defendant's Exhibit II.....	432
Defendant's Exhibit J.....	433
Defendant's Exhibit K.....	434
Final Decree.....	86
Opinion.....	77
Order for Removal.....	36-46
Order Denying Petition for Rehearing.....	96A
Order Denying Motion for Receiver.....	35
Petition for Removal.....	26-37
Petition for Rehearing.....	95
Petition for Rehearing, Order Denying.....	96A
Petition for Appeal.....	97
Record, Transcript of from Coos County.....	2
Receiver, Order Denying Motion for.....	35
Rehearing, Petition for.....	95
Rehearing, Order Denying Petition for.....	96A
Remittitur.....	92
Removal, Petition for.....	26-37
Removal, Bond on.....	32-43
Removal, Order for.....	36-46
Removal, Certificate to Transcript on.....	47
Replication.....	75
Special Deputy, Appointment of.....	20
Stipulation as to Evidence.....	114
Summons.....	17-21
Transcript of Record from Coos County.....	2

	Index.	Page
WITNESSES FOR PLAINTIFF:		
WM. T. MERCHANT.....		116
Recalled.....		204
JOHN C. MERCHANT.....		129
GEORGE WULFF.....		135
E. W. BERNITT.....		138
Recalled.....	216-225-442-496-450	
VICTOR WITTICK.....		168
Recalled.....		439
JOHN ANDERSON EURNETT.....		179
C. J. HILLSTROM.....		182
Recalled.....		423
ALFRED HOGHURD.....		186
JOHN MATTSON.....		190
Recalled.....		450
L. J. SIMPSON.....		192
J. J. SULLIVAN.....		216
CLARENCE GOULD.....		224
GEORGE NOY.....		395
C. H. WORRELL.....		402
JOHN HILL.....		416
C. A. JOHNSON.....		444
WITNESSES FOR DEFENDANT:		
C. A. SMITH.....		219
W. J. INGRAM.....		233
Recalled.....		428
ALVIN SMITH.....		253
WILLIS VARNEY.....		259
M. L. PHELAN.....		267

Index.	Page
WITNESSES FOR DEFENDANT—Continued:	
W. F. SQUIRE.....	274
C. W. DAVIS.....	284
ROBERT KRUGER.....	288
G. A. BROWN.....	294
Recalled.....	303
CHARLES H. CODDING.....	297
W. T. MERCHANT (Recalled).....	300
ARNO MERREEN.....	333
DAN McLAREN.....	335
A. H. POWERS.....	342
Recalled.....	430-455
HENRY E. COFFIN.....	428
L. J. SIMPSON (Recalled).....	436
J. E. OVEN.....	462
C. F. DILLMAN.....	464
JOHN D. GOSS.....	493
JAMES S. POLHEMUS.....	494

*In the United States Circuit Court of Appeals, for the
Ninth Circuit.*

SMITH-POWERS LOGGING COMPANY and
C. A. SMITH LUMBER AND MANU-
FACTURING COMPANY,

Appellants,

vs.

E. W. BERNITT and VICTOR WITTICK,

Appellees.

Names and Addresses of Attorneys of Record :

JOHN D. GOSS, Marshfield, Oregon, for Appellants.

W. U. DOUGLAS, Marshfield, Oregon, and
WATSON and BEEKMAN, Commercial Block, Portland,
Oregon, for Appellees.

CITATION ON APPEAL.

United States of America,

District of Oregon,—ss.

To E. W. Bernitt and Victor Wittick, Plaintiffs, and
to W. U. Douglas, John F. Hall and Watson &
Beekman, their solicitors,

Greeting:

Whereas, Smith-Powers Logging Company, a corporation, and C. A. Smith Lumber and Manufacturing Company, a corporation, have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law; You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 26th day of October in the year of our Lord, one thousand, nine hundred and fourteen.

R. S. BEAN,

Judge.

On this 28th day of October, 1914, a copy of above Citation was served upon me.

W. U. DOUGLAS,

of Attorneys for plaintiffs.

Filed November 5, 1914. G. H. Marsh, Clerk.

In the Circuit Court of the United States for the District of Oregon.

April Term 1910.

Be it remembered, that on the 5th day of July, 1910, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Transcript of Record from Coos County, Oregon, in words and figures as follows, to wit:

Be it remembered, that heretofore, on the 27th day of November A. D. 1909, a Complaint was filed in the office of the Clerk of the Circuit Court in and for the County of Coos, State of Oregon, in words and figures as follows.

*In the Circuit Court of the State of Oregon, In and For
The County of Coos.*

E. W. BERNITT and VICTOR WITTICK,

Plaintiffs,

vs.

SMITH-POWERS LOGGING CO., a corporation,

C. A. SMITH,

C. A. SMITH LUMBER & MANUFACTURING

CO., a corporation, and

SIMPSON LUMBER CO., a corporation,

Defendants.

Plaintiffs for their cause of suit against defendants state and allege as follows:

I.

That Smith-Powers Logging Co. is a corporation organized and existing under and by virtue of the laws of the State of Oregon.

II.

That C. A. Smith Lumber & Manufacturing Co. is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and doing business within the State of Oregon.

III.

That Simpson Lumber Co. is a corporation organized and existing under and by virtue of the laws of the State of California, and doing business within the County of Coos, State of Oregon, within its corporate capacity.

IV.

That on or about the year 1882, E. B. Dean, David Wilcox and C. H. Merchant, doing business under the partnership name and style of E. B. Dean & Co., and E. W. Bernitt, Wm. Klahn, George Wulff and David Young entered into a partnership agreement in manner and form as follows, towit:

That said E. B. Dean & Co. was to purchase the tide land fronting and abutting upon lot seven (7) of section thirty-one (31) on the east boundary thereof, and the tidelands fronting and abutting upon the east boundary of lot two (2) of section thirty (30) all of township twenty-five south, of range twelve (12) west of Willamette Meridian. And also the following described tidelands:

Beginning at a point S. $47^{\circ} 30'$ W. 35.00 chs. distant from the meander post on the N. bank of Coos Bay on E. boundary of Sec. 24, Twp. 25 S. R. 13 W; thence S. 68° E. 34.79 chs. to tract of tide land here-

tofore sold to David Holland; thence N. 2° E. 5.50 chs; thence E. 1.00 ch; thence N. 60° W. 5.00 chs; thence $59^{\circ} 45'$ W. 14.48 chs; thence N. $79^{\circ} 45'$ W. 16.00 chs; thence S. 5.10 chs. to place of beginning, containing 21.62 acres.

And the said E. W. Bernitt, Wm. Klahn, George Wullf and David Young, together with said E. B. Dean & Co., were to build, construct and operate upon said above described land and in the channel of Coos River, Coos County, Oregon, log booms and dolphins for the purpose of catching and storing saw logs, piles and timbers therein, and making up rafts thereof and rafting and transporting the same to the different mills and other places upon Coos Bay, in Coos County, Oregon.

And the said E. W. Bernitt, Wm. Klahn, George Wullf and David Young were to do all the rafting of the logs, timbers and piles, for which a charge was exacted in addition to the boomage charge, but were to attend the catching of the logs, timbers and piles and the storing of the same therein.

V.

That in pursuance of said co-partnership agreement, the said E. B. Dean & Co., with E. W. Bernitt, Wm. Klahn, George Wullf and David Young, entered into possession thereof and constructed thereon log booms by driving poles, dolphins and attaching sticks thereto and improving the same in accordance with said partnership agreement at a great expense to plaintiffs and plaintiffs' grantors.

And thereafter, for the purpose of extending and

enlarging said boom, it was agreed by and between the parties and with the acquiescence of the owner of said property that they should enter, and did, in accordance therewith, upon the following described property or tide lands and constructed additional booms for catching and storing logs, piles and timbers along the shores of what is commonly known as the "False Channel" of Coos River, which said tide land is described as follows:

Beginning 32.13 chs. S. by $13^{\circ} 45'$ E. from meander post on E. boundary of Sec. 24 Twp. 25 S. R. 13 W. Will. Mer. and running thence S. 40° E. 28.50 chs. along E. boundary of David Holland's Island to Marshfield channel of Coos River; thence N. 71° E. 2.20 chs. along said channel to where Coos River forks, forming Marshfield and North Bend channel; thence N. 30° W. 14.00 chs. along low water line of said North Bend channel; thence N. $47^{\circ} 30'$ W. 10.00 chs; thence N. $58^{\circ} 30'$ W. 4.00 chs; thence S. 55° W. 2.50 chs. to place of beginning, containing 8.80 acres of tide land and situated in Sec. 19 and 30, Twp. 25 S. R. 12 W. Will. Mer. in Coos County, Oregon.

VI.

That under the said partnership agreement the said E. B. Dean & Co. were to have one-half interest in boomage charge after paying one half the cost of maintenance, and each of the other parties above mentioned were to receive a one-eighth interest therein and the profits thereof, after each contributing one-eighth of the cost of maintenance; but by and with

the consent of the said partners W. Klahn sold his one-eighth interest in said partnership and business to this plaintiff, E. W. Bernitt; and David Young, likewise with the consent of the said partners, sold his interest therein to Matt Hillstrom; and thereafter by and with the consent of his partners Matt Hillstrom sold his interest to George Wullf; and thereafter the said George Wullf, by and with the consent of the said partners, sold his interest to John Mattson and Alfred Haglund; and thereafter the said John Mattson, by and with the consent of the said partners, sold his interest therein to Robert Kruger; and the said Robert Kruger, by and with the consent of his said partners, sold his interest therein to C. J. Hilstrom; and Alfred Haglund thereafter, by and with the consent of his partners therein, sold his interest to Alexander Tast; and thereafter the said Alexander Tast and C. J. Hilstrom, by and with the consent of their said partners, sold their interest in said business to John Anderson Emmett; and thereafter the said John Anderson Emmett sold his interest therein to the plaintiff Victor Wittick.

VII.

That on or about the 17th day of July, 1897, the firm of E. B. Dean & Co. was dissolved by reason of the death of David Wilcox, and thereafter the said partnership property of E. B. Dean & Co. was sold to Dean Lumber Co., a corporation organized and existing under and by virtue of the laws of the State of California; and thereafter said interest of

Dean Lumber Co. was sold and transferred to Charles A. Smith, one of the defendants above named.

VIII.

That the defendant C. A. Smith and Charles A. Smith mentioned in the foregoing paragraph are one and the same person.

IX.

That the said C. A. Smith on or about the 22nd day of March, 1909, sold his interest in the tide lands above mentioned, together with his interest in the logging booms, to the defendant Smith-Powers Logging Co.

X.

That upon the sale and purchase of the interest of E. B. Dean & Co. by the said Dean Lumber Co. of said premises, the said Dean Lumber Co. continued to act with the plaintiffs and their grantors in the joint operation and management of said logging boom and in conformity with the partnership agreement heretofore stated.

XI.

That upon the purchase of the said interest of the Dean Lumber Co. by the said Charles A. Smith, the said defendants Charles A. Smith and Smith-Powers Logging Co. continued to act with the plaintiffs above named in the joint management, operation, control, possession and ownership of said booms and property belonging to and connected therewith with these plaintiffs, up to and until March 1909, at which time the said Smith-Powers Logging Co. claimed

to own said boom, and attempted to go into complete possession thereof to the exclusion of plaintiffs; and thereafter, and to-wit, on the 22nd day of March, 1909, acquired the interest of the said Charles A. Smith therein.

XII.

That at all times since said——day of June, 1909, the said Smith-Powers Logging Co. has taken exclusive possession of said boom and prevents plaintiffs from using the same or any portion thereof.

XIII.

That the said C. A. Smith is the managing owner and director of the said C. A. Smith Lumber & Manufacturing Co. and also the Smith-Powers Logging Co.

XIV.

That the regular and customary charge imposed by said partnership and joint ownership up to the present time for the catching and storing of logs and timber in said booms was and is the sum of twenty-five cents (25cts.) per thousand feet, and one fourth ($\frac{1}{4}$) of one cent per foot for piling.

XV.

That since the first day of November, 1908, plaintiffs have in conformity with said partnership and joint ownership agreement caught in said booms for said Smith-Powers Logging Co. and C. A. Smith Lumber & Manufacturing Co., five or six million feet of timber and saw logs, and piles, and on which there is due plaintiffs the sum of twelve and one-half

(12 $\frac{1}{2}$) cents per thousand upon said saw logs and timber and one-eighth ($\frac{1}{8}$) of one cent per foot for piles, and plaintiffs have rafted to the mill of C. A. Smith Lumber & Manufacturing Co. a large portion thereof upon which there is due thirty-five cents per thousand feet for rafting said logs and one-half ($\frac{1}{2}$) of one cent per foot for said piles, the exact amount of which plaintiffs are unable to state, and said defendants C. A. Smith, Smith-Powers Logging Co. and C. A. Smith Lumber & Manufacturing Co. refuse to account to plaintiffs therefor or pay plaintiffs their proportion of the boomage charge or rafting.

XVI.

That for the purpose of defrauding these plaintiffs out of their rights in and to the said booms and booming privileges and the property and property rights connected therewith and the profits and earnings arising therefrom, the said defendants C. A. Smith, Smith-Powers Logging Co., and the C. A. Smith Lumber & Manufacturing Co., have entered into a secret agreement or understanding to prevent these plaintiffs from using said property and property rights, and fail and neglect and refuse to make any accounting to plaintiffs or pay them their proportion of the earnings and profits thereof.

XVII.

That prior to the time the said C. A. Smith sold his interest in said premises, booms and property and property rights above mentioned, and during his ownership thereof, the said Smith-Powers Logging

Co., under and by virtue of some license, privilege or permission, or otherwise from said C. A. Smith, used and occupied the said booms, booming privileges and property and property rights jointly with these plaintiffs and with full knowledge of their claims and rights therein, and the said C. A. Smith acquiesced in said joint use and occupancy thereof and ownership of these plaintiffs.

XVIII.

That during all times herein mentioned to the month of June, 1909, when defendant Smith-Powers Logging Co. took exclusive possession of said booms and refused to further recognize plaintiffs' rights therein, plaintiff by and with the acquiescence and consent of said defendants, C. A. Smith, Smith-Powers Logging Co. and C. A. Smith Lumber & Manufacturing Co. attended to the catching of all logs and booming the same, and performed each and every duty imposed upon them by their joint ownership agreement and by reason of said partnership agreement, and made up rafts of logs therein and rafted the greater portion of the logs, timbers and piles caught therein, and were ready and willing to raft the whole amount thereof, but were prevented by said defendant Smith-Powers Logging Co.

XIX.

That during the months of November and December, 1908, plaintiffs caught and stored in said booms and for the Simpson Lumber Co., defendant, by these plaintiffs, the total sum of 4,045,273 feet of timber

and saw logs and 7,667 feet of piles, upon which the said Simpson Lumber Co., agreed to pay the sum of twenty-five cents (25cts.) per thousand for said saw logs and one-fourth ($\frac{1}{4}$) of one cent per foot for piling, and thirty-five cents (35cts.) per thousand for rafting said saw logs, and one-half ($\frac{1}{2}$) a cent per foot for rafting said piling; and that these plaintiffs rafted 2,966,771 feet of said saw logs and 7,483 feet of said piling to the Mills of said Simpson Lumber Co. from said booms, and the said C. A. Smith or Smith-Powers Logging Co., plaintiffs, are unable to state which rafted the balance to said defendant Simpson Lumber Co.

XX.

That for the purpose of preventing these plaintiffs from collecting their proportion of said rafting and boomage charges referred to in the foregoing paragraph under the agreement made with defendants' grantors and plaintiffs and acquiesced in by said defendants for the purpose of carrying out said secret agreement between the said defendant C. A. Smith, Smith-Powers Logging Co., and the C. A. Smith Lumber & Manufacturing Co., and for the purpose of defrauding these plaintiffs, the said Smith-Powers Logging Co., demanded of said Simpson Lumber Co. the payment in full of said \$2503.83 on the 6th day of March, 1909, for the boomage and rafting of said logs and piles, and notified said Simpson Lumber Co., not to pay these plaintiffs and that it claimed the whole sum, and has prevented the said Simpson Lumber Co. from paying to plaintiffs their propor-

tion of said sum of money, and the said Simpson Lumber Co. refuses to pay the same or any part thereof until such time as the rights of the parties thereto are determined by law.

XXI.

That during the months of January, February and March, 1909, plaintiffs caught and boomed in said booms 1,924,460 feet of saw logs and 2,819 feet of piling, for one Clarence Gould, with directions from him to raft and deliver the same to defendant C. A. Smith Lumber & Manufacturing Co., and said plaintiffs did deliver a large portion thereof to said defendant C. A. Smith Lumber & Manufacturing Co., but was prevented from delivering the whole thereof by defendant Smith-Powers Logging Co. by reason of it taking the other portion of said Gould logs and piling and delivering the same, the exact amount delivered by each is unknown for the reasons set forth in the following paragraph.

XXII.

That defendant C. A. Smith Lumber & Manufacturing Co. purchased said logs from said Gould upon their delivery, with the agreement that it would pay the boomage and rafting charges, and plaintiffs' agreement with said Clarence Gould was that said defendant C. A. Smith Lumber & Manufacturing Co. would retain from the purchase price thereof the boomage and rafting charges due plaintiffs and pay the same to plaintiffs, and in furtherance of said agreement said defendant did retain said charges,

but in furtherance of said secret agreement between said defendants, said defendant C. A. Smith Lumber & Manufacturing Co. have refused to pay plaintiffs or render any accounting thereof whatever.

XXIII.

That since the——day of June, 1909, and during the time the said defendants C. A. Smith and Smith-Powers Logging Co., have excluded these plaintiffs from the use and possession of said booms and the operation thereof, in addition to the amount of logs, timbers and piling delivered to the said C. A. Smith Lumber & Manufacturing Co., a large number of thousand feet of saw logs, timbers and piling have been boomed and rafted in said booms, the exact amount of which is unknown, and for various other persons and corporations to plaintiffs unknown, and the said Smith-Powers Logging Co. refuses to make any statement or accounting thereof to these plaintiffs, or pay plaintiffs their proportion or any part thereof.

XXIV.

That under and by virtue of said partnership agreement and by virtue of their joint ownership in said property these plaintiffs are each entitled to one-fourth of any and all boom charges or earnings made for catching and storing or booming said logs, timbers and piles, in addition to a charge for their individual labor in rafting the same to their places of destination.

XXV.

That one of the booms, and to-wit, the one lying on the tide lands abutting lot two (2) on the eastern boundary thereof, section thirty (30), township twenty-five (25) south, of range twelve (12) west, has been used by the said Smith-Powers Logging Co. for the storing of logs, timbers and piles from September 1908, to April 1909, and also from the month of September, 1909, up to the present time, which logs and piles were rafted from other portions of Coos Bay and its tributaries, for the purpose of storing the same therein, and for the purpose of interfering with and preventing these plaintiffs from using and occupying said boom.

That the use so made of said boom is reasonably worth the sum of eighty dollars a month, and that plaintiffs are justly entitled to one-half thereof, but the said Smith-Powers Logging Co. and the said C. A. Smith Lumber & Manufacturing Co. refuses to account to these plaintiffs or pay them their proportion thereof.

XXVI.

That the improvements placed upon said lands by plaintiffs and their said grantors and said E. B. Dean & Co., in pursuance to said partnership agreement is more than the total sum of Eighteen thousand dollars (\$18,000.00), and that this plaintiff E. W. Bernitt and his grantor have contributed one fourth, and the said plaintiff Victor Wittick and his grantors have contributed one fourth, for the construction and maintenance of said booms.

XXVII.

That unless a receiver is appointed to take charge of said property and manage and control the same and wind up the affairs of the plaintiffs and said defendants, co-owners in said property, the rights and property of plaintiffs will be materially injured and impaired, and the rents and profits of plaintiffs therein will be lost, by reason of the collusion and secret agreement of the said defendants C. A. Smith, Smith-Powers Logging Co., and C. A. Smith Lumber & Manufacturing Co.

XXVIII.

That said property cannot be subdivided or partitioned without wholly destroying its value for the purpose for which it is most peculiarly adapted and most valuable, to-wit: for conducting and operating booms and booming privileges for catching and holding saw logs, timbers and piling, and that in order to do justice and equity between the parties and wind up and adjust their interests therein, it will be necessary that the premises be sold.

WHEREFORE, plaintiffs pray that an accounting be made by this Court between plaintiffs and the said C. A. Smith, the said Smith-Powers Logging Co., and the said C. A. Smith Lumber & Manufacturing Co., and that whatever interest this Court may determine these plaintiffs have in and to the sum of \$2503.83 now held by the said Simpson Lumber Co., that they and each of them have judgment against said defendant Simpson Lumber Co., for

such amount so determined to be due these plaintiffs therefrom.

That plaintiffs have judgment against C. A. Smith, C. A. Smith Lumber & Manufacturing Co., and the said Smith-Powers Logging Co., for any amount found to be due plaintiffs against either of them by reason of such accounting.

That this Court appoint a receiver to take charge of, care for, maintain and operate said booms and property connected therewith.

That if said Court shall find that said property cannot be partitioned among the owners thereof without materially destroying its value, that said receiver be ordered to sell the said premises and property and property connected therewith to the highest bidder for cash.

That the Court grant such other and further relief as to it may seem mete and equitable.

W. U. DOUGLAS,
HALL & HALL,
Attorneys for Plaintiffs.

State of Oregon,
County of Coos,—ss.

I, E. W. Bernitt, being first duly sworn, on oath depose and say: That I am one of the plaintiffs named in the within and foregoing complaint, that I have read the same, know the contents thereof, and that the same is true and correct as I verily believe.

E. W. BERNITT.

Subscribed and sworn to before me this 24 day of
November A. D. 1909.

ANNIE SMITH,

[Notarial Seal]

Notary Public for Oregon.

(Indorsements) No. 2797. In the Circuit of the
State of Oregon, in and for the County of Coos. E.
W. Bernitt and Victor Wittick, Plaintiffs, vs. Smith-
Powers Logging Co., a Corporation, C. A. Smith,
C. A. Smith Lumber & Manufacturing Co., a cor-
poration, and Simpson Lumber Co., a corporation,
Defendants. Complaint. Filed Nov. 27, 1909, James
Watson, County Clerk, by Robt. R. Watson, Deputy.
W. U. Douglas, & John F. Hall, Attorneys for Plain-
tiffs.

And afterwards, on the 13th day of December 1909,
there was filed in the office of said clerk a Sum-
mons, in words and figures following, to-wit:

*In the Circuit Court of the State of Oregon, for the County
of Coos,—ss.*

E. W. BERNITT and VICTOR WITTICK,
Plaintiffs,

vs.

SMITH-POWERS LOGGING CO., a corporation,
C. A. SMITH, C. A. SMITH LUMBER &
MANUFACTURING CO., a corporation, and
SIMPSON LUMBER CO. a corporation,
Defendants.

To Smith-Powers Logging Co., a corporation, C. A.
Smith, C. A. Smith Lumber & Manufacturing Co.,

a corporation, and Simpson Lumber Co., a corporation, Defendants.

IN THE NAME OF THE STATE OF OREGON:
You are hereby required to appear and answer the complaint filed against you in the above entitled suit within ten days from the date of the service of this summons upon you, if served within this County, or if served within any other County of this State, then within twenty days from the date of the service of this summons upon you; and if you fail so to answer for want thereof, the plaintiff will apply to the Court for relief demanded therein.

W. U. DOUGLAS and
HALL & HALL,
Attorneys for Plaintiff.

Upon which were returns as follows:
State of Oregon,
County of Coos,—ss.

I hereby certify that I received the annexed Summons on the 27th day of November, 1909, and after due and diligent search and inquiry, I herewith return that I have been unable to find the said Defendants C. A. Smith Lumber & Manufacturing Co. a corporation, and Simpson Lumber Co., a corporation within the said County of Coos, of the State of Oregon.

Dated 12-13-'09.

W. W. GAGE,
Sheriff of Coos County, Oregon.
By.....Deputy.

State of Oregon,
County of Coos,—ss.

I, W. W. Gage, Sheriff of said State and County, do hereby certify that I served the within Summons within said State and County, on the 1st day of December, 1909, on the within named Smith-Powers Logging Company, a corporation, by delivering a copy thereof, prepared and certified to be me, as Sheriff, together with a copy of the complaint, prepared and certified to be W. U. Douglas, Attorney for Plaintiff to A. H. Powers, in person.

W. W. GAGE,
Sheriff of Coos County, State of Oregon,
By.....Deputy.

To the Sheriff of Coos County, State of Oregon:

You are hereby directed to serve only one copy of the complaint in the within entitled suit, and that copy to be served upon the defendant Smith-Powers Logging Co. the other defendants to be served with a copy of summons only.

W. U. DOUGLAS,
Attorney for Plaintiff.

[Indorsements] No. 2797. In the Circuit Court, State of Oregon, for the County of Coos. Summons. E. W. Bernitt and Victor Wittick, Plaintiffs, vs. Smith-Powers Logging Co., a corporation, C. A. Smith, C. A. Smith Lumber & Manufacturing Co., a corporation, and Simpson Lumber Co., a corporation, Defendants, Received Nov. 27, 1909, W. W. Gage, Sheriff of Coos County, By C. A. Gage, Deputy.

Filed Dec. 13, A. D. 1909. James Watson, Clerk.
W. U. Douglas, Attorney for Plaintiffs.

And afterwards, on the 9th day of March, 1909,
there was filed in the office of said clerk an
Appointment of Special Deputy, in words and
figures as follows, to-wit:

*In the Circuit Court of the State of Oregon for the County
of Coos.*

E. W. BERNITT and VICTOR WITTICK,
Plaintiffs,

vs.

SMITH-POWERS LOGGING CO. a corporation
C. A. SMITH, C. A. SMITH LUMBER &
MANUFACTURING CO., a corporation and
SIMPSON LUMBER CO.,
Defendants.

APPOINTMENT OF SPECIAL DEPUTY.

State of Oregon,
County of Coos,—ss.

I, W. W. Gage, Sheriff of Coos County, Oregon,
do hereby appoint J. W. Carter as Special Deputy
Sheriff to serve the alias Summons on the Defend-
ants, C. A. Smith and C. A. Smith Lumber & Man-
ufacturing Co., a corporation, in the case of E. W.
Bernitt and Victor Wittick, Plaintiffs vs. Smith-
Powers Logging Co., a corporation, C. A. Smith,
C. A. Smith Lumber & Manufacturing Co., a corpor-
ation, and Simpson Lumber Co., Defendants.

Dated this 9th day of March, 1910.

W. W. GAGE

Sheriff of Coos County, Oregon.

State of Oregon,
County of Coos—ss.

I hereby certify that the foregoing is a true and correct copy, and the whole of the original appointment of such special Deputy.

W. W. GAGE,
Sheriff of Coos County, Oregon,
By C. A. GAGE, Deputy.

[Indorsements] No. 2797. In the Circuit Court of the State of Oregon, County of Coos. E. W. Bernitt and Victor Wittick, Plaintiff vs. Smith Powers Logging Co. et al. Defendants. Appointment of Special Deputy. Filed Mar. 9th, A. D. 1910. James Watson, Clerk ByDeputy.

W. U. Douglas, Attorney for Plaintiff.
And afterwards, on the 23rd day of April, 1910,
there was filed in the office of said clerk a

SUMMONS

In words and figures as follows to-wit:

*In the Circuit Court of the State of Oregon, for the
County of Coos.*

Appointment of Special Deputy

E. W. BERNITT and VICTOR WITTICK,
Plaintiffs,

vs.

SMITH-POWERS LOGGING CO. a Corporation,
C. A. SMITH, C. A. SMITH LUMBER & MAN-
UFACTURING CO., a Corporation, and SIMP-
SON LUMBER CO.,

Defendants.

State of Oregon,
County of Coos,—ss.

I, W. W. Gage, Sheriff of Coos County, Oregon, do hereby appoint J. W. Carter as Special Deputy Sheriff to serve the Summons & Complaint on the Defendants C. A. Smith and C. A. Smith Lumber & Manufacturing Co., a corporation, in the case of E. W. Bernitt and Victor Wittick Plaintiffs, vs. Smith-Powers Logging Co. a corporation, C. A. Smith, C. A. Smith Lumber & Manufacturing Co. a corporation, and Simpson Lumber Co., Defendants.

Dated this 9th day of March, 1910.

W. W. GAGE
Sheriff of Coos County, Oregon.

*In the Circuit Court of the State of Oregon for the
County of Coos, SS.*

E. W. BERNITT and VICTOR WITTICK,
Plaintiff,

vs.

SMITH-POWERS LOGGING CO. a Corporation,
C. A. SMITH, C. A. SMITH LUMBER & MAN-
UFACTURING CO., a Corporation, and SIMP-
SON LUMBER CO.,

Defendants.

To Smith-Powers Logging Co., a corporation, C.
A. Smith, C. A. Smith Lumber & Manufacturing
Co., a corporation and Simpson Lumber Co. a
Corporation, defendant.

IN THE NAME OF THE STATE OF OREGON:
You are hereby required to appear and answer the

complaint filed against you in the above entitled suit within ten days from the date of the service of this Summons upon you, if served within this County, or if served within any other County of this State, then within twenty days from the date of the service of this Summons upon you, and if you fail so to answer for want thereof, the plaintiff will apply to the Court for the relief demanded therein.

W. U. DOUGLAS, JOHN F. HALL,
Attorney for Plaintiff.

To the Sheriff of Coos County, Oregon:

You are hereby directed to serve only one copy of the complaint in the within entitled suit, and that copy to be served upon the defendant Smith-Powers Logging Co. the other defendants to be served with a copy of summons only.

W. U. DOUGLAS,
Attorney for Plaintiff.

Upon which was returns as follows:

State of Oregon,
County of Coos,—ss.

I, J. W. Carter, being first duly sworn, depose and say that I am the identical person appointed special deputy to serve the summons on the defendants C. A. Smith and C. A. Smith Lumber & Manufacturing Co., a corporation, in the case of E. W. Bernitt and Victor Wittick, plaintiffs, vs. Smith-Powers Logging Co., a corporation, C. A. Smith, C. A. Smith Lumber & Manufacturing Co. a corporation, and Simpson Lumber Co. a corporation, defendants. That I did serve the said summons upon the

said defendant C. A. Smith Lumber & Manufacturing Co. upon the 9th day of March, 1910, by personally delivering to C. A. Smith, President of said C. A. Smith Lumber & Manufacturing Co. at its office and place of business in Coos County, Oregon, a copy of said summons duly certified to by W. W. Gage, Sheriff of Coos County, Oregon, by delivering the same to him in person.

That I also served said summons upon the said C. A. Smith, defendant, by personally delivering to him an additional copy of said summons in the above entitled complaint, duly certified to by W. W. Gage as Sheriff of Coos County, Oregon, personally and in person within the State of Oregon, County of Coos, on the 9th day of March, 1910.

J. W. CARTER.

Subscribed and sworn to before me this 10th day of March, 1910.

(Notarial Seal) W. U. DOUGLAS,
Notary Public for Oregon.

[Indorsements] No. 2797. In the Circuit Court State of Oregon, for the County of Coos. Summons. E. W. Bernitt & Victor Wittick, Plaintiff vs. Smith-Powers Logging Co. et al, Defendant. Received Mch. 9, 1910, W. W. Gage, Sheriff of Coos County, By C. A. Gage, Deputy. Filed April 23, A. D. 1910, James Watson, Clerk, W. U. Douglas, John F. Hall, Attorney for Plaintiff.

And afterwards, on the 10th day of December, 1909,
there was filed in the office of said Clerk an

APPEARANCE,

In words and figures following, to-wit:

*In the Circuit Court of the State of Oregon, in and for
the County of Coos.*

APPEARANCE.

E. W. BERNITT and VICTOR WITTICK,
Plaintiffs,

vs.

SMITH-POWERS LOGGING COMPANY, a Cor-
poration, C. A. SMITH, C. A. SMITH LUMBER
& MANUFACTURING CO., a Corporation, and
SIMPSON LUMBER CO., a Corporation,
Defendants.

Now come the defendants Smith-Powers Logging
Company and Simpson Lumber Company, and en-
ter and file their appearance in the above entitled
suit, and herewith also file their petition for the re-
moval of said cause and suit into the Circuit Court
of the United States, in and for the District of Ore-
gon.

SMITH-POWERS LOGGING COMPANY,

By A. H. POWERS, Vice-President.

SIMPSON LUMBER COMPANY,

By E. M. SIMPSON, Manager.

JOHN D. GOSS, Attorney.

Upon which was the following return or proof of
service.

State of Oregon,

County of Coos,—ss. I hereby acknowledge due and personal service of the foregoing Appearance in the within entitled cause on me this 10 day of December A. D. 1909, by receipt personally in Coos County, Oregon, of a duly certified copy thereof.

JOHN F. HALL, one of Attorneys for Plaintiff.

[Indorsements] No. 2797. In the Circuit Court of the State of Oregon in and for the County of Coos. E. W. Bernitt and Victor Wittick, Plaintiff, vs. Smith-Powers Logging Co., et al. Defendant. Appearance. Filed Dec. 10, 1909, James Watson, County Clerk, By.....Deputy. John D. Goss, Attorney for Defendants.

And afterwards, on the 10th day of December, 1909, there was filed in the office of said clerk a petition for removal in words and figures as follows, to-wit:

PETITION FOR REMOVAL.

In the Circuit Court of the State of Oregon, in and for the County of Coos.

E. W. BERNITT and VICTOR WITTICK,
Plaintiffs,

vs.

SMITH-POWERS LOGGING CO., a Corporation,
C. A. SMITH, C. A. SMITH LUMBER & MANUFACTURING CO., a Corporation, and SIMPSON LUMBER CO., a Corporation,
Defendants.

To the Honorable Circuit Court of the State of Oregon, in and for the County of Coos:

Your petitioners, Smith-Powers Logging Company, a corporation, and Simpson Lumber Company, a corporation, respectfully show;

1st. That your petitioners are each of them parties to the above entitled suit, and are both of them defendants therein, and said suit, as appears from the complaint on file herein, is of a civil nature and is brought by the plaintiffs in the above entitled court for the partition of certain property therein set forth, for the sale thereof, for the appointment of a Receiver therefor and for an accounting of certain moneys alleged to be due said plaintiffs from the defendants.

2nd. That there is in said suit a controversy in which the matter in dispute exceeds, exclusive of costs, the sum or value of Two Thousand Dollars (\$2000), and the amount thereof is the sum of Two Thousand Five Hundred Three and 83-100 Dollars (\$2503.83), the amount for which said accounting is demanded and the further sum of Three Thousand Dollars (\$3000), which your petitioners allege is the value of the interest claimed by the plaintiffs in said property and by said suit sought to be partitioned to them, and was its said value at the time of the commencement of said suit.

3rd. That the above entitled suit is now pending in the Circuit Court of the State of Oregon, in and for the County of Coos, and no proceedings have been taken by your petitioners herein, other than

the entering and filing of their notices of appearance, together with this petition, and their bond for removal of said cause.

4th. That at the time of the commencement of said suit your petitioner, Smith-Powers Logging Company, was, ever since has been and now is a corporation, duly organized and existing under the laws of the State of Minnesota, and is a citizen and resident of the State of Minnesota, and at all times herein mentioned was and is a non-resident of the State of Oregon.

That at the time of the commencement of said suit your petitioner, Simpson Lumber Company, was, ever since has been, and now is a corporation, duly organized and existing under the laws of the State of California, and is a citizen and resident of said State of California, and at all times herein mentioned was and is a non-resident of the State of Oregon.

5th. That at the time of the commencement of said suit, the other defendant herein, C. A. Smith Lumber & Manufacturing Company, was, ever since has been, and now is a corporation organized and existing under the laws of the State of Minnesota, and is a citizen and resident of the State of Minnesota, and at all times herein mentioned was and is a non-resident of the State of Oregon.

That the other defendant C. A. Smith, at the time of the commencement of this suit was, ever since has been, and now is a citizen and resident of the State of Minnesota, and a non-resident of the State of Oregon.

6th That the plaintiffs in said suit, E. W. Bernitt and Victor Wittick, were, each and both of them at all the times herein mentioned and now are citizens of the State of Oregon.

7th. That in this suit is a controversy wholly between citizens of different States and which can be fully determined as between them that is to say between said plaintiffs, E. W. Bernitt and Victor Wittick, citizens of the State of Oregon, on the one hand, and Smith-Powers Logging Company, C. A. Smith and C. A. Smith Lumber & Manufacturing Company, citizens of the State of Minnesota, and Simpson Lumber Company, a citizen of the State of California, on the other.

8th. That said defendants C. A. Smith and C. A. Smith Lumber & Manufacturing Company, have not been served with the summons or with any papers in this suit, nor have they, or either of them in anywise appeared therein.

9th. That the service of summons in said suit was made upon the defendant Smith-Powers Logging Company and the defendant Simpson Lumber Company, your petitioners, in the County of Coos, State of Oregon, in the 2nd day of December, 1909, and not otherwise nor at any other time, and your petitioners, at the time of said service of said summons upon them, were not and are not required by the laws of the State of Oregon, or the rules of this Court, to answer or plead to the complaint in this suit until a day subsequent to the date on which this petition is filed.

10th. That your petitioners offer herewith their bond with good and sufficient surety in the penal sum of Three Thousand Dollars (\$3000) for their entering in said Circuit Court of the United States, in and for the District of Oregon, on the first day of its next session, a copy of the record in said suit, and for the paying of all costs that may be awarded by the said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed therein.

WHEREFORE, your petitioners pray your honorable court to proceed no further herein, excepting to accept said bond as sufficient, to make its order for removal of said cause, as required by law, and to cause the record herein to be removed into the said Circuit Court of the United States, in and for the District of Oregon, and for such other and further order as may be proper.

Dated December 9th, 1909.

Smith-Powers Logging Company,
By A. H. POWERS,

Vice-President.

Simpson Lumber Company,
By E. M. SIMPSON,

Manager.

JOHN D. GOSS,
Attorney for petitioners.

State of Oregon,
County of Coos,—ss.

I, A. H. Powers, being duly sworn depose and say that I am the Vice-President and Manager of

the Smith-Powers Logging Company, one of the petitioners in the foregoing Petition for Removal, that I have read the same, know the contents thereof and verily believe the same to be true.

A. H. POWERS,

Subscribed and sworn to before me this 9th day of December, 1909.

JOHN D. GOSS,

[Notarial Seal]

Notary Public for Oregon.

Upon which was the following return of proof of service.

State of Oregon,

County of Coos,—ss.

I hereby acknowledge due and personal service of the foregoing Petition in the within entitled cause on me this 10 day of December A. D. 1909, by the receipt personally in Coos County, Oregon, of a duly certified copy thereof:

JOHN F. HALL,

one of Attorneys for Plaintiff.

[Indorsements] No. 2797. In the Circuit Court of the State of Oregon in and for the County of Coos. E. W. Bernitt and Victor Wittick, Plaintiff vs. Smith-Powers Logging Co. et al, Defendant. Petition for Removal. Filed Dec. 10, 1909, James Watson, County Clerk. By.....Deputy. John D. Goss, Attorney for Defendants.

And afterwards, on the 10th day of December, 1909, there was filed in the office of said clerk the Bond of Smith-Powers Logging Company and Simpson Lumber Company, in words and figures as follows, to-wit:

BOND.

*In the Circuit Court of the State of Oregon, in and for
The County of Coos.*

E. W. BERNITT and VICTOR WITTICK,
Plaintiffs,

vs.

SMITH-POWERS LOGGING CO. a corporation,
C. A. SMITH, C. A. SMITH LUMBER &
MANUFACTURING CO., a corporation and
SIMPSON LUMBER CO., a corporation,
Defendants.

KNOW ALL MEN BY THESE PRESENTS:
That we, Smith-Powers Logging Company, a corporation organized and existing under the laws of the State of Minnesota, one of defendants herein, Simpson Lumber Company, a corporation organized and existing under the laws of the State of California, one of the defendants herein, as principals, and A. H. Powers, as surety, are held firmly bound unto the above named plaintiffs in the sum of Three Thousand Dollars, lawful money of the United States of America, for the payment of which well and truly to be made

to the said obligees, their heirs or assigns, we bind ourselves, our, and each of our heirs, administrators, successors, and assigns, jointly and severally, firmly by these presents.

WITNESS our hands and seals this 9th day of December, 1909,

The condition of the foregoing obligation is such, that, whereas the said Smith-Powers Logging Company and Simpson Lumber Company, have petitioned the Circuit Court of the State of Oregon, in and for the County of Coos, for the removal to the Circuit Court of the United States, in and for the District of Oregon, of a certain cause, suit or proceeding therein pending, and wherein E. W. Bernitt and Victor Wittick are plaintiffs, and wherein Smith-Powers Logging Company, a corporation, C. A. Smith, C. A. Smith Lumber & Manufacturing Company, a corporation and Simpson Lumber Company, a corporation, are defendants, and which suit, cause or proceeding is numbered 2797.

NOW THEREFORE, if the said Smith-Powers Logging Company and Simpson Lumber Company, the said petitioners, shall enter in said Circuit Court of the United States, in and for the District of Oregon, a copy of the record in said cause, suit or proceeding, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said cause, suit or proceeding was wrongfully or improperly removed thereto,

then this obligation shall be void, otherwise to remain in full force and effect.

Smith-Powers Logging Company,

By A. H. POWERS,

[Seal]

Vice-President,

Simpson Lumber Company,

By E. M. SIMPSON,

[Seal]

Manager,

A. H. POWERS,

[Seal]

Surety.

State of Oregon,

County of Coos,—ss.

I, A. H. Powers, the surety named in the above bond, being first duly sworn, depose and say: That I am a free holder and resident within said State, and am worth the sum of Six Thousand Dollars, over and above all my just debts and liabilities, and exclusive of property exempt from execution or forced sale.

A. H. POWERS,

Subscribed and sworn to before me this 9th day of December, 1909.

JOHN D. GOSS,

[Notarial Seal]

Notary Public for Oregon.

Upon which was the following return or proof of service.

State of Oregon,

County of Coos,—ss.

I hereby acknowledge due and personal service of the foregoing Bond in the within entitled cause on me this 10 day of December A. D. 1909, by the

receipt personally in Coos County, Oregon, of a duly certified copy thereof.

JOHN F. HALL, one of
Attorney for Plaintiff.

[Indorsements] No. 2797. In the Circuit Court of the State of Oregon in and for the County of Coos. E. W. Bernitt and Victor Wittick, Plaintiff vs. Smith-Powers Logging Co. et al. Defendant. Bond. Filed Dec. 10, 1909. James Watson, County Clerk. ByDeputy. John D. Goss, Attorney for Defendants.

And afterwards, on the 27th day of December, 1909, it being in vacation after the December 1909 term of said Court, the following Order Denying Application for Receiver, was made:

State of Oregon,
County of Coos.

Circuit Court for Coos County, In Vacation after the December 1909 Term.

In the Circuit Court for Coos County, State of Oregon.

E. W. BERNITT and VICTOR WITTICK,
Plaintiffs,

vs.

SMITH-POWERS LOGGING COMPANY et al
Defts.

The above cause came on to be heard on the application of Plaintiffs for the appointment of a receiver, J. C. Fullerton appeared as attorney for Plaintiffs and J. D. Goss as attorney for defendants.

The Court being fully advised finds that said application should be and is hereby denied.

Dated this 23rd day of December, 1909.

J. W. HAMILTON,

Judge.

Entered December 27, 1909.

James Watson, Clerk.

And afterwards, on the 27th day of December, 1909, it being in vacation after the December 1909 term of said Court, the following Order for Removal, was made:

State of Oregon,

County of Coos.

Circuit Court for Coos County, In Vacation after the December 1909 term.

In the Circuit Court for Coos County, State of Oregon.

E. W. BERNITT and VICTOR WITTICK,

Plaintiffs,

vs.

SMITH-POWERS LOGGING COMPANY, C. A.

SMITH, C. A. SMITH LUMBER and MANUFACTURING CO., and SIMPSON LUMBER CO.

Defendants.

The above named cause came on for hearing on the application of defendants to remove said cause to the Circuit Court of the United States, in and for the District of Oregon. And it satisfactorily appearing to the Court that just and legal grounds for said removal to said Court exists, that defendants have filed in this Court and herewith offer their bond with

good and sufficient surety in the sum of Three Thousand Dollars, said bond containing the condition that said defendants shall enter in said Circuit Court of the United States in and for the District of Oregon a copy of the record in said cause, and pay all costs that may be awarded by said Circuit Court of the United States if said Court shall hold that said cause is wrongfully or improperly removed thereto.

It is hereby ordered that said bond be and is approved. That said cause be and is hereby removed to the Circuit Court of the United States for the District of Oregon.

Dated this 23rd day of December, 1909.

J. W. HAMILTON,

Judge.

Entered December 27, 1909.

James Watson, Clerk.

And afterwards, on the 18th day of March, 1910, there was filed in the office of said Clerk an Appearance In words and figures as follows, to-wit:

In the Circuit Court of the State of Oregon, in and for the County of Coos.

APPEARANCE.

E. W. BERNITT and VICTOR WITTICK,

Plaintiffs,

vs.

SMITH-POWERS LOGGING COMPANY, a corporation, C. A. SMITH, C. A. SMITH LUMBER & MANUFACTURING CO., a corporation, and SIMPSON LUMBER CO., a corporation,

Defendants.

Now come the defendants, C. A. Smith Lumber & Manufacturing Company and C. A. Smith, and enter and file their appearance in the above entitled suit, and herewith also file their petition for the removal of said cause and suit into the Circuit Court of the United States, in and for the District of Oregon.

C. A. Smith Lumber & Manufacturing Company,
By C. A. SMITH, President.
C. A. SMITH.
JOHN D. GOSS, Attorney.

[Indorsements] No. 2797. In the Circuit Court of the State of Oregon, in and for the County of Coos. E. W. Bernitt and Victor Wittick, Plaintiff vs. Smith-Powers Logging Company et al, Defendant. Appearance of C. A. Smith Lumber & Mfg. Co., & C. A. Smith. Filed Mar. 18, 1910, James Watson, County Clerk, By Deputy. John D. Goss, Attorney for Petitioner.

And afterwards, on the 18th day of March, 1910, there was filed in the office of said clerk a Petition For Removal, in words and figures as follows, to-wit:

*In the Circuit Court of the State of Oregon, in and for
the County of Coos.*

PETITION FOR REMOVAL.

E. W. BERNITT and VICTOR WITTICK,
Plaintiffs,

vs.

SMITH-POWERS LOGGING COMPANY, a corporation, C. A. SMITH, C. A. SMITH LUMBER & MANUFACTURING COMPANY, a corporation, and SIMPSON LUMBER COMPANY, a corporation,

Defendants.

To the Honorable Circuit Court of the State of Oregon, in and for the County of Coos:

Your petitioners, C. A. Smith Lumber & Manufacturing Company, a corporation, and C. A. Smith, respectfully show;

1st. That your petitioners are each of them parties to the above entitled suit, and are both of them defendants therein, and said suit, as appears from the complaint on file herein, is of a civil nature and is brought by the plaintiffs in the above entitled court for the partition of certain property therein set forth, for the sale thereof, for the appointment of a Receiver therefor, and for an accounting of certain moneys alleged to be due said plaintiffs from the defendants.

2nd. That there is in said suit a controversy in which the matter in dispute exceeds, exclusive of costs, the sum or value of Two Thousand Dollars (\$2,000.00), and the amount thereof is the sum of Two Thousand Five Hundred Three and 83-100 Dollars (\$2503.83) the amount for which said accounting is demanded and the further sum of Three Thousand Dollars (\$3000.00), which your petitioners allege is the value of the interest claimed by the plaintiffs in said property and by said suit sought to be parti-

tioned to them, and was its said value at the time of the commencement of said suit.

3rd. That the above entitled suit has been removed to the Circuit Court of the United States, in and for the District of Oregon, on behalf of the Smith-Powers Logging Company and the Simpson Lumber Company, but is now pending in the Circuit Court of the State of Oregon, in and for the County of Coos as against your petitioners and no proceedings have been taken by your petitioners herein other than the entering and filing of their notice of appearance, together with this petition and their bond for removal of said cause.

4th. That at the time of the commencement of said suit your petitioner, C. A. Smith Lumber & Manufacturing Company, was, ever since has been and now is a corporation, duly organized and existing under the laws of the State of Minnesota, and is a citizen and resident of the said State of Minnesota, and at all times herein mentioned was and is a non-resident of the State of Oregon.

That at the time of the commencement of said suit your petitioner C. A. Smith, was, ever since has been and now is a citizen and resident of the State of Minnesota and a non-resident of the State of Oregon.

5th. That at the time of the commencement of said suit, the other defendants herein, Smith-Powers Logging Company and the Simpson Lumber Company, each of them were, ever since have been and now are foreign corporations organized and

existing under the laws of the State of Minnesota and the State of California, respectfully and citizens and residents of said states respectively.

6th. That the plaintiffs in said suit, E. W. Bernitt and Victor Wittick, were, each and both of them at all the times herein mentioned and now are citizens and residents of the State of Oregon.

7th. That in this suit there is a controversy wholly between citizens of different states and which can be fully determined as between them that is to say between said plaintiffs, E. W. Bernitt and Victor Wittick, citizens of the State of Oregon, on the one hand, and Smith-Powers Logging Company, C. A. Smith and C. A. Smith Lumber & Manufacturing Company, citizens of the State of Minnesota, and Simpson Lumber Company, a citizen of the State of California, on the other.

8th. That the service of summons in said suit was made upon your petitioners in the County of Coos and State of Oregon, on the 9th day of March, 1910, and not otherwise, nor at any other time, and at the time of said service of said summons upon them, they were not and are not required by the laws of the State of Oregon, or the rules of this Court, to answer or plead to the complaint in this suit until a day subsequent to the date on which this petition is filed.

9th. That your petitioners offer herewith their bond with good and sufficient surety in the penal sum of Three Thousand Dollars (\$3000,00), for their entering in said Circuit Court of the United States' in and for the District of Oregon, on the first day of its

next session, a copy of the record in said suit, and for the paying of all costs that may be awarded by the said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed therein.

WHEREFORE, your petitioners pray your honorable court to proceed no further herein, excepting to accept said bond as required by law, and to cause the record herein to be removed into the said Circuit Court of the United States, in and for the District of Oregon, and for such other and further order as may be proper.

Dated March 17th, 1910.

C. A. Smith Lumber & Manufacturing Company,

By C. A. SMITH, President.

JOHN D. GOSS,

Attorney for Petitioners.

State of Oregon,

County of Coos,—ss.

I, C. A. Smith, being duly sworn depose and say that I am the President of the C. A. Smith Lumber & Manufacturing Company, one of the petitioners in the foregoing Petition for Removal that I make this verification on behalf of the said C. A. Smith Lumber & Manufacturing Company and myself individually, that I have read the same, know the contents thereof and verily believe the same to be true.

C. A. SMITH.

Subscribed and sworn to before me this 17th day of March, 1910.

W. J. CONRAD,

[Notarial Seal]

Notary Public for Oregon,

My commision expires July 2nd, 1911.

[Indorsements] No. 2797. In the Circuit Court of the State of Oregon, in and for the County of Coos. E. W. Bernitt and Victor Wittick, Plaintiffs vs. Smith-Powers Logging Company et al. Defendants. Petition for Removal. Filed Mar. 18, 1910. James Watson, County Clerk, By.....Deputy. John D. Goss, Attorney for Petitioners.

And afterwards, on the 18th day of March, 1910, there was filed in the office of said clerk a Bond In words and figures as follows, to-wit:

BOND.

In the Circuit Court of the State of Oregon, in and for the County of Coos.

E. W. BERNITT and VICTOR WITTICK,
Plaintiffs,

vs.

SMITH-POWERS LOGGING COMPANY, a corporation, C. A. SMITH, C. A. SMITH LUMBER & MANUFACTURING CO., a corporation, and SIMPSON LUMBER CO., a corporation,
Defendants.

KNOW ALL MEN BY THESE PRESENTS: That we, C. A. Smith Lumber & Manufacturing Company, a corporation organized and existing under the laws of the State of Minnesota, one of defendants herein, and C. A. Smith, one of the defendants herein, as principals, and A. H. Powers, as surety, are held and firmly bound unto the above named plaintiffs in the sum of Three Thousand Dollars, lawful money

of the United States of America, for the payment of which well and truly to be made to the said obligees, their heirs or assigns, we bind ourselves, our, and each of our heirs, administrators, successors, and assigns, jointly and severally, firmly by these presents.

WITNESS our hands and seals this 17th day of March, 1910.

The condition of the foregoing obligation is such, that, whereas the said C. S. Smith Lumber & Manufacturing Company and C. A. Smith, have petitioned the Circuit Court of the State of Oregon, in and for the County of Coos, for the removal to the Circuit Court of the United States, in and for the District of Oregon, of a certain cause, suit or proceeding therein pending, and wherein E. W. Bernitt and Victor Wittick are plaintiffs, and wherein E. W. Bernitt and Victor Wittick are plaintiffs, and wherein C. A. Smith Lumber & Manufacturing Company, a corporation, and C. A. Smith, are defendants.

NOW THEREFORE, if the said C. A. Smith Lumber & Manufacturing Company and said C. A. Smith, the said petitioners, shall enter in said Circuit Court of the United States, in and for the District of Oregon, a copy of the record in said cause, suit or proceeding, on the first day of the weekly regular session of said Court, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said cause, suit or proceeding was wrongfully or improperly removed thereto, then this

obligation shall be void, otherwise to remain in full force and effect.

C. A. Smith Lumber & Manufacturing Company,

[Seal] By C. A. Smith, President,

[Seal] C. A. SMITH,

[Seal] A. H. POWERS, Surety,

State of Oregon,

County of Coos,—ss.

I, A. H. Powers, the surety named in the above bond, being first duly sworn, depose and say: That I am a freeholder and resident within said State and am worth the sum of Six Thousand Dollars, over and above all my just debts and liabilities, and exclusive of property exempt from execution or forced sale.

A. H. POWERS,

Subscribed and sworn to before this 17 day of March, 1910.

G. A. BROWN,

[Notarial Seal] Notary Public for Oregon.

[Indorsements] No. 2797. In the Circuit Court of the State of Oregon, in and for the County of Coos. E. W. Bernitt and Victor Wittick, Plaintiff vs. Smith-Powers Logging Company, et al, Defendant. Bond. Filed Mar. 18, 1910. James Watson, County Clerk. By.....Deputy. John D. Goss, Attorney for Petitioners.

And afterwards on the 21st day of April, 1910, it being the 18th day of the December, 1909, Term of said Court, the following

Order of Removal

Was entered:

In the Circuit Court for Coos County, State of Oregon.

No. 2797.

E. W. BERNITT and VICTOR WITTICK,
Plaintiffs,

vs.

SMITH-POWERS LOGGING COMPANY, C. A.
SMITH, C. A. SMITH LUMBER and MAN-
UFACTURING CO., and SIMPSON LUMBER
CO.,

Defendants.

The above named cause came on for hearing on the application of defendant C. A. Smith Lumber and Manufacturing Company to remove said cause to the Circuit Court of the United States in and for the District of Oregon, and it satisfactorily appearing to the Court that just and legal grounds for said removal to said Court exists, that defendants have filed in this Court and herewith offer their bond with good and sufficient surety in the sum of Three Thousand Dollars, said bond containing the condition that said defendants shall enter in said Circuit Court of the United States in and for the District of Oregon a copy of the record in said cause, suit or proceeding on the first day of the weekly regular session of said Court and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said Court shall hold that said cause is wrongfully or improperly removed thereto.

It is hereby ordered that said bond be and is approved that said cause be and is hereby removed to the Circuit Court of the United States for the District of Oregon.

Dated this 19th day of April, 1910.

[Order Sd] J. W. HAMILTON,

Judge.

Entered April 21, 1910: James Watson, Clerk.

CERTIFICATE.

*In the Circuit Court of the State of Oregon in and for
the County of Coos.*

E. W. BERNITT and VICTOR WITTICK,

Plaintiffs,

vs.

SMITH-POWERS LOGGING CO. a corporation,
C. A. SMITH, C. A. SMITH LUMBER &
MANUFACTURING CO., a corporation, and
SIMPSON LUMBER CO., a corporation,

Defendants.

State of Oregon,

County of Coos,—ss.

I, James Watson, County Clerk of Coos County, State of Oregon, ex-officio Clerk of the Circuit Court of the State of Oregon in and for the County of Coos, do hereby certify that I have prepared the foregoing Transcript of Removal in the above entitled case and embracing the following papers, to-wit:

Complaint, Summons, Appointment of Special Deputy, Summons, Appearance, Petition for Removal, Bond, Order Denying Application for Receiver, Order

of Removal, Appearance, Petition for Removal, Bond, Order of Removal; that I have compared the said Transcript with the original papers in the above entitled cause on file in my office, together with all the orders made and entered in said cause on the Journals of said Court and that the same is a true and correct Transcript of said original papers and orders and of the whole thereof.

I further certify that on the 10th day of December, 1909, and the 18th day of March, 1910, good and sufficient Bonds in due form of law, on the said Removal of Cause herein, was filed in this office in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Circuit Court this 28th day of May A. D. 1910.

[Seal]

JAMES WATSON,

County Clerk.

Transcript Filed July 5, 1910. G. H. Marsh,
Clerk.

And afterwards, to wit, on the 3rd day of October, 1910, there was duly Filed in said Court and cause, an Answer of Smith-Powers Logging Company, C. A. Smith, and C. A. Smith Lumber and Manufacturing Company, in words and figures as follows, to wit:

Answer.

The joint and separate answers of Smith-Powers Logging Company, a corporation, C. A. Smith, C. A. Smith Lumber and Manufacturing Company, a cor-

poration, to the complaint of E. W. Bernitt and Victor Wittick, plaintiffs above named.

Now come Smith-Powers Logging Company, a corporation, C. A. Smith and C. A. Smith Lumber and Manufacturing Company, a corporation, defendants in the above entitled suit and jointly and separately answering the complaint of the plaintiffs herein;

I.

Admit that the Smith-Powers Logging Company is a corporation, but deny that it was organized under and by virtue of the laws of the State of Oregon, and allege that it is and at all times therein mentioned was organized and existing under and by virtue of the laws of the State of Minnesota, and is duly qualified, licensed and authorized to transact business in the State of Oregon.

II.

Admit that C. A. Smith Lumber and Manufacturing Company is a corporation organized and existing under and by virtue of the laws of the State of Minnesota and doing business in the State of Oregon.

III.

Admit that Simpson Lumber Company is a corporation, organized and existing under and by virtue of the laws of the State of California, and doing business within the County of Coos, and State of Oregon.

IV.

Admit and allege that about the year 1882 E. B. Dean, David Wilcox and C. H. Merchant, were co-partners doing business under the firm name and style of E. B. Dean & Co., with their principal place of business at Marshfield, in the County of Coos and State of Oregon, and that on said date the said co-partnership of E. B. Dean & Co. was the owner of the tide lands abutting upon Lot Seven (7) of Section Thirty-one (31) on the east boundary thereof, and the tide lands fronting and abutting upon the east boundary of Lot Two (2) of Section Thirty (30) all in Township Twenty-five (25) South, of Range Twelve (12), West of the Willamette Meridian, Oregon, and was also the owner of the tide land described in paragraph numbered IV of the complaint herein and allege that on or about said year 1882, the said partnership of E. B. Dean & Co. erected upon said lands and in the adjacent channel of Coos River in Coos County, State of Oregon, log booms and dolphins and piles, together constituting a boom for the catching, storing and sorting of logs and piling and were then and there in possession of said lands and said boom and thereafter caused to be constructed additional booms of like character upon and along the lands set out and described in paragraph numbered V of the complaint herein.

V.

That these defendants respectively have been informed and believe that no partnership agreement

was formed or attempted to be formed by the said E. B. Dean & Co., or the members thereof or any of them with the said E. W. Bernitt, Wm. Klahn, George Wullf and David Young, or any of them, either as in said complaint alleged or otherwise or at all, but that said E. W. Bernitt, Wm. Klahn, George Wullf, and David Young, were by agreement with the said E. B. Dean & Co., then and for a number of years thereafter, allowed the use of said booms and were allowed to go in said booms and remove logs and piling stored therein for various persons and companies, doing business upon the waters of said Coos Bay, Coos County, Oregon, and to take, remove and tow away rafts of logs and piling so caught in said booms and for said privilege and for said use of said booms, the said parties last named were to and did assist with their labor in a small measure in the erection of said booms and were to and did keep said booms in such state of repair as to permit of its continued use, and that the said E. W. Bernitt, Wm. Klahn, George Wullf and David Young, were associated together in said use of said booms, and were accustomed to and did charge for all logs or timber caught therein the sum of $12\frac{1}{2}$ c per thousand feet, board measure, and $\frac{1}{8}$ of a cent per lineal foot for piling, for so catching, storing and sorting said logs, and that the owners of all said logs and piling paid to the said E. B. Dean & Co. a like sum of $12\frac{1}{2}$ cents per thousand feet, board measure, for all logs and $\frac{1}{8}$ of a cent per lineal foot for all piling, a boom rental for the rental and use of said boom for the

purpose of catching, storing and sorting of said logs and piling.

VI.

That these defendants are informed and believe and, therefore allege that the said E. W. Bernitt, Wm. Klahn, George Wullf and David Young, did enter into possession of said log boom and said premises by virtue only of said agreement, heretofore set out and not as owning any interest therein, and not as partners with said E. B. Dean & Co., and that said parties above named, or any of them never at any time, until shortly before the commencement of this suit, claimed any title, right or partnership interest in or to said boom, or any right therein, other than that growing out of said agreement hereinbefore set forth and that in the several alleged transfers of interest set forth in paragraph numbered VI of the complaint herein, the said several persons therein alleged to have transferred an interest in said boom and said alleged partnership never transferred, claimed to transfer or pretended to transfer any interest in any partnership in said boom or said property upon which the same was constructed, but that in each and every instance of such transfer the parties selling, sold and claimed to sell and transfer only logging gear, boats, ropes and similar appliances and the purchasers, purchased only such logging gear, boats, ropes and appliances, and that in each instance it was mutually understood between the parties to said transfer that the parties purchasing

could, with the consent of the said E. B. Dean & Co., continue to use the said boom of the said E. B. Dean & Co. in connection with their rafting and logging business upon the waters of Coos Bay from year to year and the said several parties to said purchases and sales never at any time signed any articles of partnership or considered themselves, or acted as partners of the said E. B. Dean & Co., or of each other.

VII.

These defendants deny that the plaintiff E. W. Bernitt was at any time a partner of E. B. Dean & Co., or any of the members thereof in said boom, or otherwise, or owned or claimed any interest in said boom, that the plaintiff Victor Wittick, bought or owned, or now owns any interest in said boom or any part thereof or at any time owned any interest therein and any that the said John Anderson Emmett at any time bought or owned any interest in said boom or was at any time a partner to E. B. Dean & Co., or any of the members thereof and deny that Alexander Thomas and C. J. Hillstrom, or either of them at any time bought or owned any interest in said boom, or were at any time copartners with the said E. B. Dean & Co. in said boom or otherwise and deny that Alfred Haglund, C. J. Hillstrom, Robert Kruger, John Matson and Matt Hillstrom, or either or any of them at any time bought or owned any interest in said boom, or any portion thereof or claimed to be or were partners with said E. B.

Dean & Co. or any of the members of said company, in said boom or otherwise.

VIII.

These defendants admit that on or about the 17th day of July, 1897, the firm of E. B. Dean & Co. was dissolved by reason of the death of David Wilcox, one of the members thereof and that thereafter the partnership property of the said E. B. Dean & Co. was sold and transferred to the Dean Lumber Company, a corporation, organized and existing under and by virtue of the laws of the State of California, and admit that thereafter, to-wit on the 13th day of February, 1906, said property was sold and transferred by the said Dean Lumber Company to Charles A. Smith, who is the C. A. Smith, one of the answering defendants herein.

IX.

That thereafter, and on the 14th day of July, 1907, said defendant, C. A. Smith, entered into an agreement to sell said tide lands in the complaint herein described, together with said logging booms and improvements thereon to the defendant Smith-Powers Logging Company, and the said Smith-Powers Logging Company then agreed to purchase the same, went into possession thereof and ever since have been in the open, continued and exclusive control thereof. That pursuant to the said agreement to purchase, a deed to said property was duly executed

to the said Smith-Powers Logging Company by the said C. A. Smith, on the 22nd day of March, 1909.

X.

The defendants deny that the Dean Lumber Company ever acted with the plaintiffs or the plaintiffs' grantors in the joint operation and management of said logging boom and in conformity with any partnership agreement, either in said complaint set out or otherwise, and allege that said Dean Lumber Company upon and after the sale and purchase of said premises and property from E. B. Dean & Co., allowed the plaintiffs and others now alleged by the plaintiffs to be plaintiffs' grantors to take logs from said booms and use the same for rafting purposes in accordance with the agreement theretofore existing with E. B. Dean & Co., and hereinbefore set forth, and not in conformity or attempted conformity to any partnership agreement whatsoever.

XI.

These defendants deny that the said Charles A. Smith and the Smith-Powers Logging Company, or either of them continued to act with the plaintiffs or ever acted with the plaintiffs in the joint management, operation, control, possession or ownership of said booms and property up to or until March, 1909, or at any time, and allege that said defendants C. A. Smith and Smith-Powers Logging Company had no notice, knowledge or information that the

plaintiffs claimed or pretended to own any interest whatsoever in said boom, or said property or in the management or control thereof, until the month of October, 1907, and immediately upon hearing of such claim the said Smith-Powers Logging Company, which was then in the possession, control and management of said property and said boom, under its said agreement, to purchase the same from the said C. A. Smith, by and through its proper agents, informed and notified the plaintiffs that they and each of them had no right, title, interest or ownership in said boom or said property.

XII.

That the said defendant Charles A. Smith at no time personally took possession of or the control or management of said boom, but at all times while the title to the same rested in him, entrusted the care, management and control thereof to the said Smith-Powers Logging Company, its officers and agents; That after the purchase of said property and boom by said C. A. Smith, as hereinbefore set out, the plaintiffs herein claimed and asserted to said defendant and his agents in charge of said boom that they had theretofore been using said boom and rafting logs therefrom under an arrangement with the former owners thereof, substantially as set forth in paragraph numbered VI of this answer.

XIII.

These defendants admit that said C. A. Smith is a director and is President of both the corpora-

tion defendants, C. A. Smith Lumber and Manufacturing Company and the Smith-Powers Logging Company, but deny that he is the managing owner of either of said corporations, and further allege that the said defendant C. A. Smith Lumber and Manufacturing Company at no time owned or claimed and does not now own or claim any right, title or interest in or to said boom or said property or any part thereof.

XIV.

These defendants are informed and believe that the customary charge imposed for the catching, storing, rafting and towing of logs, timber and piling in said booms was the sum of sixty cents per thousand feet, board measure, for logs and one-fourth of one cent per lineal foot for piling and that the owners of said logs and piling were charged and customarily paid the sum of 35 cents per thousand feet for towing said logs and timber and the sum of 12½ cents per thousand feet for the catching and storing of said logs and timber and the sum of 12½ cents per thousand feet for the rental and use of said boom and premises for said purpose.

XV.

These defendants deny that there is any sum whatever due the plaintiffs or either of them as alleged in paragraph numbered XV of the complaint herein, or that there is any sum whatever due from these defendants, or either of them to said plaintiffs or

either of them and allege the facts to be that immediately upon going into possession of said boom and premises and upon being informed by the plaintiffs and the former owners thereof, that the arrangement, agreement and understanding under which the same had theretofore been operated was as set forth in paragraph numbered VI of this answer, the defendants agreed with the plaintiffs that the plaintiffs might continue for the remainder of the logging year to operate said boom in the same manner and upon the same terms as the same had theretofore been operated, and the plaintiffs continued to so operate the same until the 15th day of October, 1908, at which time the defendants informed the plaintiffs that thereafter the Smith-Powers Logging Company would take exclusive charge of all booming and rafting operations in and about said boom and premises and the said Smith-Powers Logging Company then and there informed the plaintiffs that in case the plaintiffs wished to work for them in, around or upon said boom and assist in the rafting, towing and other work incident to the operation thereof, that it would pay them or either of them the usual price for similar labor and the reasonable value thereof, and thereafter the plaintiffs did assist in said work and rendered in all twenty-eight (28) days service, the customary price for which services and the reasonable value thereof is Three Hundred Ninety Dollars (\$390.00), and these defendants deny that there is due the plaintiffs, or either of them any sums as partners, or joint

owners or as being in anywise interested in the booming, rafting and logging operations conducted in, from or upon said boom and premises since the 1st day of November, 1908, either from the defendant C. A. Smith Lumber and Manufacturing Company or from any of the defendants herein, and deny that the plaintiffs are entitled to charge or receive any boomage or rafting charge or receive any portion of any boomage or rafting charge for any of said operations and allege that the plaintiffs are entitled to receive no sum by reason thereof other than the payment for their services above set forth, which services defendants allege have been paid in full.

XVI.

These defendants deny that they or any of them have entered into any secret agreement or understanding to prevent the plaintiffs from using said property or property rights and deny the plaintiffs or either of them are entitled to any accounting or to any proportion of the earnings and profits from the operation of said boom or said premises.

XVII.

These defendants deny that the Smith-Powers Logging Company at any time used and occupied said boom, booming privileges, property and property rights, jointly with the plaintiffs or with either of them and deny that said Smith-Powers Logging Company or the said C. A. Smith, or any of these

defendants had any knowledge, prior to October 15, 1908, of any claim of right, title or interest therein, by the plaintiffs or either of them, other than that set forth in paragraph numbered VI of this answer.

XVIII.

These defendants deny that the plaintiffs performed any services upon said boom or performed any duty in connection therewith at any time in the complaint herein or in this answer mentioned other than as hereinbefore set forth or upon any terms, agreements or understandings other than as hereinbefore set forth and deny that the plaintiffs performed any services on, upon or in connection with said boom or property, subsequent to the 1st day of November, 1908, other than or of a greater value than as set forth in paragraph numbered XV of this answer, and deny that the plaintiffs attended to the catching and booming of said logs during said time and deny that they were ready, able or willing to raft the whole amount thereof, or any considerable proportion thereof.

XIX.

These defendants admit that during the months of November and December, 1908, there were caught and stored in said booms for the Simpson Lumber Company, a total of 4,045,275 feet of timber and saw logs and 7,667 feet of piling, but deny that the plaintiffs rafted any of said timber or piling and allege

that said Smith-Powers Logging Company had charge of and did all the rafting and towing thereof and are entitled to pay therefor and for all thereof from the said Simpson Lumber Company, and admit that the plaintiffs rendered services in connection with towing portions thereof, but allege that said services were rendered pursuant to the hiring of the plaintiffs therefor as hereinbefore set forth, and are all included in and form a part of the services performed by plaintiffs for defendant Smith-Powers Logging Company and set forth in paragraph numbered XV of this answer.

XX.

These defendants admit that the Smith-Powers Logging Company demanded payment of said Simpson Lumber Company for said services referred to in the foregoing paragraph and notified said Simpson Lumber Company not to pay the plaintiffs any portion thereof, but deny that said action was taken pursuant to any secret agreement between these defendants or any of them or for the purpose of defrauding the plaintiffs and allege that the plaintiffs, without the consent of the defendants and without any order therefor, demanded and collected from the said Simpson Lumber Company the sum of Six Hundred Dollars (\$600.00), so due the defendant, Smith-Powers Logging Company, for said services referred to in the foregoing paragraph and that the plaintiffs still retain the same and that by reason of said unlawful collection and retention thereof,

there is now due the defendant Smith-Powers Logging Company from the plaintiffs as a balance over and above all sums due from the said Smith-Powers Logging Company to the plaintiffs as set forth in paragraph numbered XV of this answer, the sum of Two Hundred Ten Dollars (\$210.00), together with interest thereon from the 2nd day of January, 1909, the date upon which said payment was made by the said Simpson Lumber Company.

XXI.

These defendants admit that during the months of January, February and March, 1909, said logs and piling were caught and boomed for one Clarence Gould and delivered to the C. A. Smith Lumber and Manufacturing Company, pursuant to a contract for that purpose theretofore entered into by and between said C. A. Smith Lumber and Manufacturing Company and said Clarence Gould, that said C. A. Smith Lumber and Manufacturing Company was to pay the boomage and rafting charges therefor and allege that said C. A. Smith Lumber and Manufacturing Company has duly paid all of said rafting charges and the boomage due upon said logs and piling and further allege that all of said logs caught in said boom and then rafted or towed from said boom and premises to the mill of the C. A. Smith Lumber and Manufacturing Company, were so caught, rafted and towed by the Smith-Powers Logging Company, and any and all services and assistance rendered by the plaintiffs in catching,

booming, rafting and towing said logs and piling upon or from said boom and premises were rendered by the plaintiffs to the said Smith-Powers Logging Company, and are included in and form a portion of the services set forth in paragraph numbered XV of this answer, and deny that by reason thereof there is any sum whatever due from the C. A. Smith Lumber and Manufacturing Company, or from any of the defendants to the plaintiffs, or either of them.

XXII.

These defendants deny that there was any agreement between the said Clarence Gould and the C. A. Smith Lumber and Manufacturing Company, whereby the said company should pay the plaintiffs the boomage and rafting charges upon said logs and piling mentioned in the foregoing paragraph or should pay the plaintiffs or either of them any sum whatsoever, and deny that the said company has retained said sums or any part thereof by reason of any secret agreement between these defendants or any of them, and deny that the plaintiffs or either of them have at any time asked for or demanded a statement or account of said logs or of the charges for rafting and booming the same, of the said C. A. Smith Lumber and Manufacturing Company or any of the defendants, and deny that said company has refused to render any statement or accounting thereof.

XXIII.

Admit that since theday of June, 1909, the Smith-Powers Logging Company has rafted and boomed a large amount of logs, timber and piling in said booms and upon said premises, for various persons and corporations and admit that no statement or accounting thereof has ever been rendered to the plaintiffs, but allege that the plaintiffs have never demanded a statement or accounting thereof and deny that the plaintiffs are entitled to any statement or accounting thereof and deny that the plaintiffs have any right or interest therein or in the monies received therefor.

XXIV.

These defendants deny that the plaintiffs are entitled to one-fourth of the boom charges or earnings made for catching or storing or booming logs, timber and piling or to any proportion thereof or to any sum whatever in addition to the charges for their individual labor for rafting the same to their places of destination.

XXV.

These defendants admit that at various times since the 1st day of September, 1908, the defendant Smith-Powers Logging Company has used the boom lying on the tide lands abutting Lot Two (2) on the eastern boundary thereof in Section Thirty (30), Township Twenty-five (25) South, of Range Twelve

(12) West in said Coos County, for the purpose of storing logs and timber therein, but deny that the use so made of said boom was reasonably worth the sum of Eighty Dollars (\$80.00) per month or any sum whatever, or that the plaintiffs are entitled to one-half of said sum or to any sum whatsoever by reason of such use of said boom and deny that such use was made for the purpose of interfering with or preventing the plaintiffs from using or occupying said boom, and deny that the plaintiffs had or have any right, title or interest in or to said boom or to the use thereof and allege that the plaintiffs have never demanded any statement or account of such use of said boom.

XXVI.

These defendants deny that the plaintiffs or their grantors ever paid for any improvements placed upon any of the said booms or the properties in the complaint herein or this answer set forth or ever contributed in anywise to the value thereof other than by their services rendered pursuant to the agreement and arrangements set forth in paragraph numbered VI of this answer, and deny that the improvements placed upon said lands were or are worth the sum of Eighteen Thousand Dollars (\$18,000.00) of that the total value of said improvements at the time the same were purchased by the said Smith-Powers Logging Company were of any 'greater' value than One Thousand Dollars (\$1,000.00), and deny that the plaintiff E. W. Bernitt, or his grant-

ors have contributed one-fourth or the plaintiff Victor Wittick, or his grantors have contributed one-fourth or any proportion or part whatever for the construction and maintenance of said booms.

XXVII.

These defendants admit that said property cannot be subdivided or partitioned without wholly destroying its value for the purpose for which it is most peculiarly adapted and most valuable, but deny that the same should be sold or in anywise interfered with by the plaintiffs or by the order of the Court.

XXVIII.

Further answering these defendants allege that neither the plaintiffs nor the plaintiffs' grantors, nor the said E. B. Dean & Co., nor the Dean Lumber Company, nor any of them at any time had or received, nor was there issued to them or to anyone for them or otherwise any permit from the War Department of the United States, or from any lawful authority for the erection or maintenance of said booms or any portion thereof or any of the piling or other property constituting said boom, and said booms other than those erected by these defendants, were erected and maintained in the navigable waters of Coos Bay and of Coos River in Coos County, Oregon, contrary to and in violation of the laws of the United States, and particularly of the Act of Congress, passed September 19, 1890, and acts amen-

datory thereof, and were at all times illegal and unauthorized and unlawful.

XXIX.

These defendants further allege that at the time of the purchase thereof by the defendant C. A. Smith and at the time of taking possession thereof by the defendant Smith-Powers Logging Company, said piling, dolphins and boom sticks, constituting said boom were decayed, dilapidated and in such state of disrepair, that they were practically valueless and unsuited, unsafe and insufficient for the purpose for which they were intended, that the plaintiffs had utterly failed and neglected to repair or maintain said boom in a proper and safe condition and that it became and was necessary to forthwith entirely reconstruct said boom.

XXX.

That since its purchase of the same the said Smith-Powers Logging Company has obtained proper and legal permits from the proper authorities of the United States Government for the erection and maintenance of booms in, along and upon and adjacent to the premises described in the complaint herein and has, pursuant to said authority, erected proper and legal booms thereon, and has necessarily expended in erecting the same the sum of \$9,891.02.

XXXI.

These defendants further allege that as a condition precedent to allowing the erection of said booms

the War Department of the United States required the defendant, Smith-Powers Logging Company to remove from the channel of said Coos River, dolphins, cribs and piling theretofore placed in said channel and forming a portion of said former illegal boom so theretofore maintained therein and that in so doing and in complying with said condition, and removing the said obstructions, said defendant, Smith-Powers Logging Company, has necessarily expended the sum of Six Hundred Dollars (\$600.00).

XXXII.

These defendants further allege that in order to secure permits for the erection of said boom and proper and necessary additions thereto, and in order to secure the use of the tide lands upon which said booms are and were placed, it has been necessary for the defendant, Smith-Powers Logging Company, to purchase tide lands and adjacent highlands of the total value of \$12,615.50, and in order to erect and maintain said boom, the said Smith-Powers Logging Company has expended said sum in the necessary purchase of said lands and tide lands upon and adjacent to which said boom has been erected.

XXXIII.

These defendants allege that said booms theretofore maintained upon said premises and used by the plaintiffs herein, have been necessarily removed by the defendant Smith-Powers Logging Company in improving said property and in erecting proper and

legal booms thereon and that no portion of said former booms or any of the material or piling constituting the same is now used or standing upon said property, excepting a few piles along the inner or shoreward side of said boom, all of which are of no greater value than \$300.00. That since the commencement of this suit the plaintiffs have taken away and removed all the old log booms and boom sticks, then remaining in said boom of the booms and boom sticks constituting the old boom maintained on said premises, prior to June 1st, 1908, and all the boom sticks now used in and forming part of said boom have been purchased, prepared and placed therein by the said Smith-Powers Logging Company, at its own cost and expense.

XXXIV.

Further answering these defendants allege that by a certain statute of the State of Oregon, commonly called the Statute of Frauds, all contracts and agreements relating to land, except as therein excepted, are required to be reduced into writing and signed by the party or parties to be bound thereby, and that there is not and never has been any such agreement in writing between the plaintiffs or plaintiffs' grantors and said E. B. Dean & Co. or Dean Lumber Company, or any of these defendants, relative to said lands in the complaint herein set forth or to the erection or maintenance of said boom or booms thereon, or to the use thereof, and, therefore, these defendants insist that said alleged agreements in the complaint

herein set out are void as against these defendants and these defendants claim the same benefit as if they had pleaded the said statute in this cause.

XXXV.

That the maintenance and use of said boom is appurtenant to the ownership of said tide lands upon which the same is located and to the ownership of the said land in front of and abutting upon which said boom is constructed, and the defendant Smith-Powers Logging Company, is, the owner in fee simple, entitled to the possession and in the actual possession of said lands and tide lands.

XXXVI.

And these defendants allege that by a statute of the State of Oregon, duly enacted and in force at all the times in the complaint herein or in this answer mentioned, commonly known as the recording act, it was and is provided that every conveyance of real property within said state shall be void against any subsequent purchaser thereof in good faith and for a valuable consideration, unless the same shall be duly recorded with the County Clerk of the County in which said property is situated; that no instrument conveying or purporting to convey any right or title whatsoever in or to said boom or the said tide lands or the said abutting lands was ever recorded in said County of Coos or is of record therein, and the said C. A. Smith had no knowledge, notice or intimation of any adverse rights, claims, interests or equities

of the plaintiffs or either of them, either as copartners with said Dean Lumber Company or otherwise, in or to said property or any portion thereof; that said records in the office of said County Clerk of said Coos County showed the said Dean Lumber Company to be the absolute owners in fee simple of said property and the said C. A. Smith purchased the same, for a valuable consideration then paid by him, from said Company, a proper conveyance thereof was duly executed by it to him and was forthwith duly and regularly recorded in the office of said County Clerk, and the said C. A. Smith was in all respects an innocent purchaser of said property, and the defendant Smith-Powers Logging Company in like manner purchased and paid for said lands, tide lands, boom and property from the said C. A. Smith, and went into possession thereof, as hereinbefore set forth, without any notice, knowledge or intimation whatever of or from the plaintiffs that they or either of them owned or claimed any right, title or interest therein or in any part thereof or of the rents and profits thereof and was and is in all respects an innocent purchaser thereof for value, and the plaintiffs by their silence and neglect to set up any claim to said property or to inform the defendants or either of them that they had or claimed any right, title or interest in said property, should be and are estopped from now setting up any claim whatsoever thereto; and this allegation the defendants make in bar of the plaintiffs' complaint, and pray that they may have the benefit thereof as if they had formally pleaded the same.

XXXVII.

And these defendants allege that the said Dean Lumber Company was a corporation duly organized as in the complaint herein set forth and doing business thereafter as such until the sale of said property to the defendant C. A. Smith; that the defendants Smith-Powers Logging Company and C. A. Smith Lumber and Manufacturing Company were and are corporations duly organized, existing and doing business as in the complaint herein set forth and that said corporations are each of them incapable by reason of their corporate capacity of becoming or being co-partners with the plaintiffs, or either of them; and this allegation these defendants make in bar of the plaintiffs' complaint and pray like benefit therefrom as though they had pleaded the same.

WHEREFORE, these defendants having fully answered, confessed, traversed and denied all the matters in the same complaint material to be answered, according to their best knowledge and belief, humbly pray this honorable court to enter its judgment that these defendants be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

C. A. Smith Lumber and Manufacturing Company,

[Corporate Seal] By C. A. SMITH,

President

Attest CHARLES L. TRABERT,

Secretary

Smith-Powers Logging Company,
[Corporate Seal] By A. H. POWERS,
Vice-President and General Mgr.
Attest CHARLES L. TRABERT,
Secretary.

C. A. SMITH,
JOHN D. GOSS,
Solicitor for Defendants.

United States of America,
State of Minnesota,
County of Hennepin,—ss.

C. A. Smith, being duly sworn on oath deposes and says that he is the President of the C. A. Smith Lumber and Manufacturing Company, a Minnesota corporation one of the defendants herein, and that he is the C. A. Smith named as one of the defendants herein; that he has read the foregoing Answer, knows the contents thereof and the allegations therein contained, as far as they relate to his own acts and deeds are true, and as far as they relate to the acts and deeds of others, he believes them to be true.

That in regard to the matter and things in the foregoing Answer alleged, which are not within the personal knowledge of the deponent, this deponent has been fully informed and believes that the same are true.

C. A. SMITH

Subscribed and sworn to before me this 14th day of September, 1910.

LYMAN E. MINER,
Notary Public, Hennepin County, Minn.
[Notarial Seal] My Commission expires July 2, 1911.

United States of America,
State and District of Oregon,
County of Coos,—ss.

A. H. Powers, being first duly sworn on oath deposes and says that he is the Vice-President and General Manager of the Smith-Powers Logging Company, one of the defendants in the foregoing entitled suit; that he has read the foregoing Answer, knows the contents thereof and the allegations therein contained, as far as they relate to his own acts and deeds are true, and as far as they relate to the acts and deeds of others, he believes them to be true.

That in regard to the matter and things in the foregoing Answer alleged, which are not within the personal knowledge of the deponent, this deponent has been fully informed and believes that the same are true.

A. H. POWERS,

Subscribed and sworn to before me this 23rd day
of September, 1910.

[Notarial Seal] GERTRUDE MILLER,
Notary Public for Oregon.

Filed October 3, 1910. G. H. Marsh, Clerk.

And afterwards, to wit, on the 2nd day of November, 1910, there was duly filed in said Court, and cause a Replication, in words and figures as follows, to, wit:

REPLICATION.

The replication of the above named defendants to the answer of the above-named defendants, Smith-Powers Logging Co., a corporation, C. A. Smith, and C. A. Smith Lumber & Manufacturing Co., a Corporation.

These replicants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendants, for replication thereunto do say that they do and will ever maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants is very uncertain, evasive and insufficient in the law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed, or denied is true; all which matters and things these replicants are ready to aver, maintain and prove as this Honorable Court shall direct, and

humbly as in and by their said bill they have already prayed.

W. U. DOUGLAS, JOHN F. HALL and
WATSON & BEEKMAN,
Attorneys & Solicitors for Plaintiffs.

District of Oregon,
County of Coos,—ss.

I, Victor Wittick and E. W. Bernitt, being first duly sworn, each depose and say that I am the plaintiff in the above entitled suit; and that the foregoing replication is true as I verily believe.

VICTOR WITTICK, his mark X
E. W. BERNITT.

Subscribed and sworn to before me this 31st day of October, 1910.

[Seal] W. U. DOUGLAS,
Notary Public for the State of Oregon.

District of Oregon,
County of Coos,—ss.

Due service of the within Replication is hereby accepted in Coos County, Oregon, this 31 day of Oct. 1910, receiving a copy thereof, duly certified to as such by W. U. Douglas, Attorney for plaintiffs.

JOHN D. GOSS,
Attorney for Defts.

Filed November 2, 1910. G. H. Marsh, Clerk.

And afterwards, to wit, on the 20th day of April, 1914, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit:

OPINION.

Watson & Beekman, John F. Hall and W. U. Douglas for Plaintiffs.

John D. Goss and J. C. Kendall for Defendants.
WOLVERTON, District Judge:

The testimony in this case is so voluminous that I can scarcely do more than state my conclusions.

About the year 1882, E. B. Dean, David Wilcox and C. H. Merchant were partners doing business as E. B. Dean & Co., and at that time were to purchase or were in control of certain tide lands, comprising the channel of Coos River and what is known as the false channel thereof. E. B. Dean & Co., either before entering into the agreement about to be noticed or subsequently thereto, acquired the title to these tide lands, excepting one tract which they held under lease. The firm entered into an oral agreement with E. W. Bernitt, Wm. Klahn, George Wulff and David Young, whereby the parties to the agreement were to construct and operate upon the tide lands mentioned and in the channel of Coos River, and in the said false channel, log booms and dolphins for the purpose of catching and storing sawlogs, piles and other timbers therein, and making up rafts for transportation elsewhere about Coos Bay. By the terms of the agreement Dean & Co. were to re-

ceive one-half the boomage charges, and the other parties were each to receive one-eighth of such charges, and they were all to contribute to the maintenance of such booms in like proportion, it being understood that Bernitt, Klahn, Wullf and Young were to capture the logs as they came down Coos River and assemble them in the booms, among which would be logs of Dean & Co., for which work there was to be a charge of 25 cents per thousand log measure. It was this remuneration that it was agreed should be divided among the parties in the proportion above indicated. Beyond this, Bernitt, Klahn, Wullf and Young were privileged to put the logs in rafts and transport them to the mills about the bay, and for this service make their own charges, in which Dean & Co. were to have no share.

There is little or no dispute touching the agreement relative to the construction and operation of these logging booms and the boomage charges to be made, and the division of the charges among the parties concerned, whether it be called a partnership agreement or not. The booms were constructed at large expense in pursuance of the terms of the agreement, one being known as the upper and the other as the lower boom. E. B. Dean & Co. contributed one-half of this expense and Bernitt, Klahn, Wullf and Young the other half.

Since the construction of the booms the firm of E. B. Dean & Co. was dissolved by the death of David Wilcox, and thereafter the Dean Lumber Company, a corporation, became the owner of the partnership

property. This latter company was for a time in the hands of a receiver, but eventually the property passed to C. A. Smith, and from him to the C. A. Smith Lumber & Manufacturing Company. Later the booms and boom privileges, or the Lumber Company's interest therein, including the lands upon which they were constructed, were conveyed to the Smith-Powers Logging Company. C. A. Smith is the principal stockholder in the C. A. Smith Lumber & Manufacturing Company, and that company is the principal stockholder in the Smith-Powers Logging Company, so that the Lumber Company dominates the Logging Company.

E. W. Bernitt and Victor Wittick have duly succeeded, through mesne and intermediate conveyances and transfers, to the original interest of Bernitt, Klahn, Wulf and Young in such booms, together with the rights and privileges thereunto appertaining. There is much evidence in the record respecting the devolution of this interest in the booms, and it is not altogether harmonious or clear. I am persuaded, however, that the plaintiffs are, by fair and just intendment, the present owners of such interest.

It is one of the contentions of counsel for defendants, E. B. Dean & Co. having been dissolved by the death of Wilcox, that the alleged partnership agreement between the company and Bernitt and others was likewise dissolved, and that henceforth the agreement, if duly consummated in the beginning was nugatory and without binding force. In answer to this, the record shows that all persons and cor-

porations succeeding to E. B. Dean & Co. have recognized the agreement and have treated with Bernitt and others and their successors under the strict terms thereof. Hence it can make no difference, that Dean & Co. were dissolved or that the dominant estate changed hands from time to time. The rights and privileges of Bernitt and others were at all times recognized and respected down to the present ownership of the premises upon which the booms are constructed and maintained, and it is now too late to controvert plaintiffs' interest in the booms. The Logging Company, which is now the owner of the lands and premises upon which the booms are constructed, expressly recognized the rights and privileges of plaintiffs by consenting to their use and operation of the booms for the logging season of 1907-1908, under the arrangements that had previously obtained. That it did this the testimony abundantly shows. For the subsequent season of 1908-1909 the Logging Company permitted the use of the booms by plaintiffs, but refused to recognize their right to compensation under the old agreement, and it alleged that in June, 1909, the Logging Company wholly ousted plaintiffs from the use and occupation. This allegation seems not to be controverted by the defendants, and must be taken as true. Further than this, the evidence shows the fact quite clearly.

As to the nature of the interest that plaintiffs possess in the booms, it is wholly unnecessary to determine. It is sufficient to know that Bernitt and others, under

an agreement with E. B. Dean & Co., though verbal, expended their means along with Dean & Co. in the construction and maintenance of the booms. We may call it an easement, or license, or what you will, but it was a valuable right, of which they ought not, in justice and equity, to be deprived without remuneration according to the value of the plant and their interest therein. The right or license is assuredly irrevocable to the extent at least that it could not be appropriated by another without just compensation. What the defendant the Logging Company did in the present case was to oust the plaintiffs and appropriate the interest that plaintiffs possessed in the booms, and it has thus rendered itself liable to plaintiffs for that interest, which is a one-half interest in the booms and dolphins and appliances for holding the logs in place within the booms.

There is considerable dispute as to the value of this interest. Bernitt thinks the booms ought to be worth ten, eleven or twelve thousand dollars, what he estimates they cost to construct. It is not very clearly shown what they did cost, no record having been kept of the expenditures attending construction, and the estimate is tinctured largely with conjecture. Elsewhere the witness says the upper boom cost in the neighborhood of \$3000 and the lower \$4500, which together amount to very much less than the aggregate estimate. The booms have been in existence a long time, the first having been built about 1882, and the other some two or three or four years

later. They have therefore been in use for 30 years, more or less, and the deterioration by the ravages of time and the elements must have been very considerable. Another condition to be considered is that the general Government required the booms to be so changed in part as to leave a portion of the channel of Coos River open and free to navigation. This requirement imposed a large amount of expense for reconstruction. The plaintiffs were unable to meet that expense, and the booms with an open channel through them without reconstruction would be rendered of much less value than in their original condition. When the Lumber Company transferred the booms to the Logging Company a valuation thereof was made, which was fixed at \$2000. This, it should be said, included a small tract of tide lands needed for enlarging the booms. The estimate seems to have been fairly made, with a purpose of arriving at the true value, and not with any view that it should be self-serving in anticipation of the present controversy. I attach little value to the tide lands included in the estimate, and conclude that \$2000 is a fair estimate of the value of the booms at the time plaintiffs were ousted by the Logging Company, thus making the value of plaintiffs' one-half interest \$1000.

Plaintiffs also seek an accounting for boomage charges on logs captured, and for certain logs rafted by them and transported to the mills of the C. A. Smith Lumber & Manufacturing Company and the Simpson Lumber Company.

It is alleged by the bill of complaint that since

November, 1908, plaintiffs have caught in said booms for the Logging Company and the Lumber Company five or six million feet of timber and sawlogs, on which there is due plaintiffs the sum of $12\frac{1}{2}$ cents per 1000 feet for sawlogs and one-eighth of one cent per foot for piles, and that plaintiffs have rafted to the mill of the Lumber Company a large portion thereof, upon which there is due 35 cents per 1000 feet for sawlogs and one-half of one cent per foot for piles, plaintiffs being unable to state the exact amount due.

It is further alleged that during the months of November and December, 1908, the plaintiffs caught and stored in said booms for the Simpson Lumber Company a quantity of logs and piling, and rafted a large portion of such logs and piles to the mills of said company, for which services the Simpson Lumber Company is indebted to plaintiffs, but that the Smith Lumber Company and the Logging Company have prevented the payment thereof and in effect appropriated the amount due to their own use. Also that during the months of January, February and March, 1909, plaintiffs caught in said booms certain logs for one Clarence Gould, and subsequently rafted and delivered a large portion thereof to the Lumber Company, and that said Lumber Company purchased such logs from Gould with the agreement that it would pay plaintiffs boomage and rafting charges, but has refused to account to plaintiffs for same.

These allegations set forth in effect the matters pertinent to an accounting.

Plaintiffs are entitled to an accounting from the time when the defendants refused to continue the joint operation of the booms with plaintiffs up to the time when plaintiffs were ousted and wholly deprived of further use and occupancy, which, as we have seen, was in June, 1909. This leaves for ascertainment the amount the defendants are liable to account for to plaintiffs.

There were caught in the booms for the Simpson Lumber Company during the logging season of 1908 and 1909, 4,045,273 feet of logs. Of these 2,966,771 feet were rafted and transported by the plaintiffs. Plaintiffs were entitled to one-half the boomage charges, namely, $12\frac{1}{2}$ cents per 1000 upon the whole, and rafting charges of 35 cents per 1000 upon the latter amount, totaling \$1544.03. To this should be added \$18.93 for logs boomed and rafted, making a grand total of \$1562.96. Against this the Logging Company is entitled to a credit of \$295.30, leaving a balance due on the Simpson Lumber Company account of \$1267.66. I arrive at this deduction from the fact that the Simpson Lumber Company had an account with Bernitt and Wittick, or perhaps with Bernitt alone but for account of both of them, upon which there was a balance due Bernitt and Wittick of \$304.70, and the Logging Company intercepted the payment of the balance by directing the Simpson Lumber Company to account to it for all logs delivered to such Lumber Company from the booms. Later the Logging Company paid to the Simpson Lumber Company \$600 to be applied on

the Bernitt and Wittick account, and it was so applied and the amount charged to the Logging Company. This discharged the balance due and left \$295.30 to be applied as a credit to the Logging Company, and I so apply it here.

The Gould logs were also caught in the boom, of which there were 1,924,460 feet. A large portion of these were rafted and delivered by Bernitt and Wittick to the Lumber Company, the true amount not being ascertained. The Lumber Company should have known the amount, but did not disclose it, and withheld the boomage and rafting charges. Bernitt and Wittick were unable to state the true amount rafted and transported, but were depending upon the statement of the Lumber Company therefor. I therefore charge the Lumber Company with one-half the boomage charge and the rafting and transportation charges in addition upon the whole of said logs, amounting, together with a charge of \$10.57 for booming and rafting a small amount of piling, to \$924.68.

Beyond these matters, Bernitt testifies that 4000 logs passed through the booms, which would run from 900 to 1000 feet to the log, upon which he should have received one-half of the boomage charges, but did not. For this he should have credit, which amounts to \$475, averaging the logs at 950 feet to the log.

These various sums, namely,

One half value of boom.....	\$1000.00
Due on Simpson Lumber Co. logs..	1267.66
Due on Gould logs.....	924.68
and for	
One half boomage on other logs....	475.00

Aggregating.....\$3667.34

the plaintiffs are entitled to recover from the defendants, the C. A. Smith Lumber & Manufacturing Company and Smith-Powers Logging Company, and such will be the order and decree of the court, with costs to plaintiffs.

Filed April 20, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on Wednesday, the 29th day of April, 1914, the same being the 51st JUDICIAL day of the Regular March, 1914, TERM of said Court; Present: the HONORABLE Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Final Decree.

This cause came on to be heard on the 25th day of November 1913, at the November Term of this Court, and was argued and submitted by counsel; and thereupon upon consideration thereof, it was and is found, ordered, adjudged and decreed as follows, viz:

That about the year 1882 the plaintiff, E. W. Bernitt and Wm Klahn, George Wulff and David Young entered into an oral partnership or joint venture agreement with E. B. Dean, David Wilcox and C. H. Merchant, partners doing business as E. B. Dean & Co., for the construction and operation by them jointly of certain log booms and dolphins for catching and storing sawlogs, piles and other timber therein upon certain tidelands then owned or controlled or thereafter to be acquired by said firm of E. B. Dean & Co., in and about or adjacent to the channels of Coos River, in the vicinity of Coos Bay, and in Coos County, Oregon, and also the tideland in and about or adjacent to what is commonly known as the false channel of Coos River adjacent to said Coos Bay, and in addition to this the said E. W. Bernitt, Wm Klahn, George Wulff and David Young were to make up the rafts thereof and transport the same to the various points on Coos Bay; that under said agreement a boomage charge of 25 cents per thousand feet board measure was to be made for catching said logs in said booms and one eighth of one cent per lineal foot for piling caught therein, of which E. B. Dean & Co., were to receive one half and said other parties one eighth each thereof, and they were all to contribute to the cost of the construction and maintenance of said booms in like proportions; that in addition to this the said Bernitt, Klahn, Wulff and Young were to be allowed to make a charge of 35 cents per thousand feet for saw logs and one half of one cent per foot for piling for making them up into rafts and transporting the same and said E. B. Dean &

Co., was to receive no part thereof; that said log booms and dolphins were so constructed in accordance with and pursuant to said agreement, and toward the cost thereof E. B. Dean & Co., contributed one half and the said other parties to said agreement the other half, and the first and upper boom was constructed about the year 1882, and the other and lower boom was constructed four or five years subsequent; that from the time said booms were so constructed said parties and their successors in interest continued to operate the same under the terms of said agreement until the hereinafter named defendant took exclusive possession and control thereof in June, 1909; that the plaintiffs E. W. Bernitt and Victor Wittick have duly succeeded through mensne and intermediate conveyances and transfers, to the original interest of said Wm Klahn, E. W. Bernitt, George Wulff and David Young in said booms, together with the rights and privileges thereunto appertaining, and are the present owners of such interest in equal shares, and were such owners during the years 1907, 1908, 1909; that the defendant Smith-Powers Logging Company has duly succeeded through mensne and intermediate conveyances and transfers to the interest of said E. B. Dean & Co., in said booms and to the ownership of said tide lands upon which they are constructed, and is the present owner of said interest and said tidelands; that the defendant C. A. Smith and C. A. Smith lumber & Manufacturing Company, purchased and acquired said interest and tidelands from the grantee of said E. B. Dean & Co., in February, 1907, sold

and agreed to convey the same, with other property, to the defendant, Smith-Powers Logging Company, and said defendants, C. A. Smith Lumber & Manufacturing Company and Smith-Powers Logging Company, thereafter assumed and exercised the rights of ownership of said interest and said tidelands, in conjunction with the plaintiffs, but said defendants C. A. Smith and C. A. Smith Lumber & Manufacturing Company did not cause formal instruments of transfer and conveyance of said interest and tide lands to be made to said defendant, Smith-Powers Logging Company, until on or about the day of March, 1909; that the defendant, C. A. Smith, is the principal and controlling stockholder in the defendant, C. A. Smith Lumber & Manufacturing Company, and said defendant C. A. Smith Lumber & Manufacturing Company, is the principal stockholder in, and has dominated and dominates, said defendant, Smith-Powers Logging Company; that all the persons and corporations succeeding to and owning said interest of said E. B. Dean & Co., in said booms, including the defendants, C. A. Smith, C. A. Smith Lumber & Manufacturing Company and Smith-Powers Logging Company, have recognized and acted under said agreement, and have dealt with the plaintiff E. W. Bernitt and his co-party thereto according to and under the terms thereof; that the defendants, C. A. Smith Lumber & Manufacturing Company, and Smith-Powers Logging Company, since acquiring said interest of said E. B. Dean & Co., in said booms and the ownership of said tidelands, have expressly recognized the rights and privi-

leges of plaintiffs by consenting to the use and operation of said booms by plaintiff during the logging season of 1907 and 1908 under the arrangements that had previously obtained and conformably to said original agreement, and permitted the use and operation thereof by plaintiffs during the rafting and logging season of 1908 and 1909, but refused to recognize their right to the compensation under said original agreement, and in June 1909, ousted the plaintiffs from the use and occupation of said booms and further participation in the operation and profits thereof; that at the time of said ouster of plaintiffs in June, 1909, said booms were of the reasonable value of \$2000.00, and \$1000.00 was and is the reasonable value of the plaintiffs' interest therein; that said interest of plaintiffs in said booms under said agreement was and is irrevocable without just compensation, and by said ouster, said defendants, C. A. Smith Lumber & Manufacturing Company and Smith-Powers Logging Company, rendered themselves liable to plaintiffs for said reasonable value thereof, viz: \$1000.00; that plaintiffs are entitled to an accounting for boomage charges on logs and other timber caught and stored in said booms and for further charges for logs and other timbers by them rafted and transported or transferred to the mills of the defendant, C. A. Smith Lumber & Manufacturing Company, and the Simpson Lumber Company, on said Coos Bay, during the logging and rafting season of 1908-1909 and up to the time of said ouster from the use and occupation of said booms in June, 1909; that, during the logging season of 1908-1909,

the plaintiffs caught and stored in said booms for the said Simpson Lumber Company, 4,045,273 feet of logs and rafted and transported to the mill of said company 2,966,771 feet thereof and became and were and are entitled to one half of the boomage charges thereon, viz: $12\frac{1}{2}$ cents per thousand feet upon said 4,045,273 feet, and to the rafting charge of 35 cents per thousand feet upon said 2,966,771 feet thereof, aggregating the sum of \$1544.03, and also to \$18.93 for piles boomed and rafted, making a total amount of \$1562.96; that plaintiffs also during said logging season of 1908-1909 caught in said booms and rafted and transported to the mill of the defendant, C. A. Smith Lumber & Manufacturing Company 1,924,460 feet of logs, and became and were and are entitled to one half of the boomage charge thereon, viz: $12\frac{1}{2}$ cents per thousand feet, and to the rafting charges of 35 cents per thousand feet thereon, together with a charge of \$10.57 for booming and rafting certain piling, amounting to \$924.68; that plaintiffs further became and were and are entitled to one half of the boomage charge, viz: $12\frac{1}{2}$ cents per thousand feet, upon 4000 logs, averaging 950 feet to the log, which passed through said booms during said logging and rafting season, amounting to \$475.00, which said sums have been collected and retained by said defendants C. A. Smith Lumber & Manufacturing Company and Smith-Powers Logging Company, except that the Smith-Powers Logging Company is entitled to a credit \$295.30 on account of certain monies paid by it to said Simpson Lumber Company to be applied to the account of the plaintiff E. W. Bernitt; that

the plaintiffs are entitled to recover from the defendants, Smith-Powers Logging Company and C. A. Smith Lumber & Manufacturing Company, and each of them, the aggregate sum of \$3667.34, with the costs and disbursements of this suit:

And it was and is therefore, ordered, adjudged and decreed that the plaintiffs, E. W. Bernitt and Victor Wittick, do have and recover of and from said defendants, Smith-Powers Logging Company and C. A. Smith Lumber & Manufacturing Company, and each of them, the aggregate sum of Three thousand six hundred and sixty-seven and 34-100 dollars (\$3667.34), together with the costs and disbursements of this suit herein to be taxed.

Dated April 29, 1914.

CHAS. E. WOLVERTON,

Judge.

Filed April 29, 1914.

A. M. Cannon, Clerk.

And afterwards, to wit, on the 1st day of June, 1914, there was duly filed in said Court, and cause a Remittitur, in words and figures as follows, to wit:

REMITTITUR.

The above named plaintiffs, E. W. Bernitt and Victor Wittick, do hereby remit the sum of three hundred four dollars and seventy cents (\$304.70) upon that certain judgment made and entered in the above entitled Court and in the above entitled cause, and do hereby direct the Clerk of said above entitled

Court to so enter said remittitur upon the Judgment Docket therein for the reason that in the written opinion of the Court upon which said judgment is based, said Court found as one of the items making up said judgment that said plaintiffs were entitled to recover of and from the said defendants Smith-Powers Logging Company and C. A. Smith Lumber & Manufacturing Company fifteen hundred sixty-two dollars and ninety-six cents (\$1562.96) for logs caught and rafted by plaintiffs for Simpson Lumber Company, and also found that said Smith-Powers Logging Company had placed to the credit of said plaintiffs with said Simpson Lumber Company the sum of six hundred dollars (\$600.00), but said Court only allowed said defendants a credit of two hundred ninety-two dollars (\$292.00) therefor upon said fifteen hundred sixty-two dollars and ninety-six cents (\$1562.96) and said three hundred four dollars and seventy cents (\$304.70) is remitted for the purpose of allowing said defendants a credit of the full sum of six hundred dollars (\$600.00) so found to have been paid by said defendant Smith-Powers Logging Company to said defendant Simpson Lumber Company for and on behalf of said plaintiffs.

IN WITNESS WHEREOF the said plaintiffs have hereunto set their hands and seals this 25 day of May, 1914.

[Seal]

E. W. BERNITT

[Seal]

VICTOR WITTICK

Signed and sealed in presence of:

W. U. DOUGLAS

ANNIE SMITH

State of Oregon,
County of Coos,—ss.

Be it remembered, that on this 25th day of May, 1914, at Coos County, Oregon, before me, the undersigned, a Notary Public for Oregon, appeared E. W. Bernitt and Victor Wittick, to me known to be the identical persons described in and who executed the within and foregoing instrument; and they acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and Notarial seal the date and year last above herein written.

[Notarial Seal]

ANNIE SMITH,
Notary Public for Oregon.

State of Oregon,
County of Coos,—ss.

I hereby acknowledge personal service of the foregoing Remittur in the within entitled cause on me this 28 day of May, A. D. 1914, by the receipt personally in Coos County, Oregon, of a duly certified copy thereof.

JOHN D. GOSS,
Attorney for Defts.

Rec'd May 2 1914.

Filed June 1, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on the 6th day of July, 1914, there was duly filed in said Court and cause, a Petition for re-hearing, in words and figures as follows, to wit:

PETITION FOR RE-HEARING.

The Petition of the defendants, Smith-Powers Logging Company, C. A. Smith, C. A. Smith Lumber & Manufacturing Company, respectfully shows:

That this cause came on to be heard on the 25th day of November, 1913, and thereafter a decision was duly handed down, and on or about the 29th day of April, 1914, a decree, in conformity to said decision, was signed and entered herein.

That the basis and the only basis of the court's decision and decree is an agreement which the court holds to have been subsisting between the parties. Resting its decree and decision solely upon this agreement as aforesaid the court finds the plaintiffs entitled to certain sums of money as their share of the profits arising from the operation of the boom.

No deductions from these profits are made, however, notwithstanding the fact that the court says, in both the decision and decree that:

“They were all to contribute to the maintenance of the boom in like proportion”.

That it is manifest error to enforce only that part of the contract which entitles the plaintiffs to compensation, without enforcing that part which requires

the plaintiffs to bear their proportion of the expense, when the record clearly shows that in addition to the amount expended by defendants for re-building and repairs, they expended large sums in the maintenance of the boom.

That the defendants, if entitled to a credit of any part of the \$600.00 paid to the Simpson Lumber Company, and by that company paid or credited to the plaintiffs, are entitled to a credit for all of that amount, and it is manifest error to allow defendants a credit of less than one-half thereof.

That while the court finds, as part of the agreement that plaintiffs were themselves to do the work of rafting, and the record clearly shows that defendants expended large sums in employing men to do this work, and yet no credit or allowance therefor is made to defendants, and plaintiffs are allowed the full amount as though they had performed the work at their own expense.

In consideration whereof, and inasmuch as such errors and imperfections appear in the record of the case and in the body of the said decree, your petitioner prays that a re-hearing be granted herein.

To the end therefore, that the said plaintiffs may, if they can, show cause why your petitioners should not have the relief hereby prayed, and to which they are justly entitled in the premises, your petitioners now pray the court to grant them due process by an order requiring the said plaintiffs to show cause why this

And afterwards, to wit, on Monday, the 13 day of July 1914 the same being the 7th Judicial day of the Regular July Term of said Court; Present: the Honorable Charles E. Wolverton United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER DENYING REHEARING.

This cause was submitted to the Court upon the petition of the defendant for rehearing and the Court having considered said petition, it is Ordered and adjudged that said petition be, and the same is hereby denied.

petition should not be granted, and your petitioners will ever pray.

SMITH-POWERS LOGGING CO.

C. A. SMITH LUMBER & MANUFACTURING CO.

Petitioners.

JOHN D. GOSS,
Attorney for Petitioners.

State of Oregon,
County of Coos,—ss.

I hereby acknowledge due and personal service of the foregoing petition in the within entitled cause on me this 1st day of July A. D. 1914, by the receipt personally in Coos County, Oregon, of a duly certified copy thereof.

W. U. DOUGLAS,
One of Attorneys for plaintiff.

Filed July 6, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on the 24th day of October, 1914, there was duly filed in said Court and cause, a Petition for Appeal, in words and figures as follows, to wit:

PETITION FOR APPEAL.

The defendants, Smith-Powers Logging Company, and C. A. Smith Lumber and Manufacturing Company, above named, considering themselves aggrieved by

the decree made and entered in the above entitled cause on the 29th day of April, 1914, which decree ordered, adjudged, and decreed that the plaintiff recover of the defendants the Smith-Powers Logging Company, and C. A. Smith Lumber and Manufacturing Company, and each of them, the aggregate sum of Three Thousand, Six Hundred, Sixty-Seven and 34-100 Dollars (\$3,667.34) with costs and disbursements, does hereby appeal from said decree and order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors which is filed herewith, and prays that this appeal be allowed, and that a transcript of the record and the proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 22nd day of October, 1914.

JOHN D. GOSS,

Attys. for Smith-Powers Logging Co.
& C. A. Smith Lumber & Manufacturing Co.

Assignment of errors having been filed, and the security required by law having been given and approved, the foregoing appeal is allowed.

R. S. BEAN,

District Judge.

Filed October 24, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on the 24th day of October, 1914, there was duly filed in said Court and cause, an Assignment of Errors, in words and figures as follows, to wit:

ASSIGNMENT OF ERRORS.

On this the 22nd day of October, 1914, come the defendants, Smith-Powers Logging Company, and C. A. Smith Lumber and Manufacturing Company, by their solicitor, John D. Goss, and say that there is manifest error in the proceedings in the above entitled suit, that the opinion filed herein on the 20th day of April, 1914, is erroneous, that the decree filed and entered herein on the 29th day of April, 1914, is erroneous and unjust to defendants, and these defendants hereby assign the same as error herein, and that the Court erred in the following particulars which these defendants assign as error, and upon which they will rely upon appeal:

1. That the Court erred in finding that it was unnecessary to decide the character and nature of the interest of the plaintiffs in said booms.

2. That the Court erred in allowing any evidence or considering complainant's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 30 and each of them.

3. That the Court erred in finding that the plaintiffs E. W. Bernitt, William Klahn, George Wulff, and David Young entered into an oral partnership with E. B. Dean, David Wilcox, and C. H.

Merchant, partners doing business as E. B. Dean and Company, in the year 1882, or at all.

4. That the Court erred in finding that the plaintiffs E. W. Bernitt, William Klahn, George Wulff, and David Young entered into a joint venture agreement with E. B. Dean, David Wilcox, and C. H. Merchant, partners doing business as E. B. Dean and Company, in 1882, or at all.

5. That the Court erred in finding that the plaintiffs E. W. Bernitt, William Klahn, George Wulff, and David Young entered into an agreement with E. B. Dean, David Wilcox, and C. H. Merchant, partners doing business as E. B. Dean and Company, for the construction and operation by them jointly of certain log booms and dolphins, for the catching and storing of saw logs, piles, and other timber.

6. That the Court erred in finding that such agreement was for the construction and operation of log booms upon land at the time thereof owned or controlled or thereafter to be acquired by the firm of E. B. Dean and Company.

7. That the Court erred in finding that there was an agreement between E. W. Bernitt, William Klahn, George Wulff, and David Young and the firm of E. B. Dean and Company whereby the former were to make up the rafts and transport the same to various points on Coos Bay.

8. That the Court erred in finding that there was an agreement between E. W. Bernitt, William Klahn,

George Wulff, and David Young whereby a boomage charge of twenty-five cents per thousand feet, board measure, was to be made for catching logs in the Coos River booms, and one-eighth of one cent per lineal foot for piling caught therein, of which E. B. Dean and Company were to receive one-half and said other parties one-eighth, each.

9. That the Court erred in holding that all parties were to contribute to the cost and maintenance of said boom in like proportion.

10. That the Court erred in finding that in addition to the boomage, Bernitt, Klahn, Wulff, and Young were to be allowed to make a charge of thirty-five cents per thousand feet for saw logs, and one half of one cent per foot for piling for making it up into rafts and transporting the same and the said E. B. Dean and Company was to receive no part thereof.

11. That the Court erred in finding that the said log booms and dolphins were constructed in accordance with and pursuant to such agreement.

12. That the Court erred in finding that E. B. Dean and Company contributed one-half for the cost of constructing the said log boom and dolphins and said parties contributing the other half.

13. That the Court erred in finding that from the time said booms were constructed the parties and their successors in interest continued to operate the same under the terms of such agreement found by the Court, until defendant Smith-Powers Logging Company took exclusive possession and control thereof.

14. That the Court erred in finding that the defendant Smith-Powers Logging Company took exclusive possession and control of said booms in June, 1909.

15. That the Court erred in finding that plaintiffs E. W. Bernitt, Victor Wittick have duly succeeded through mesne and intermediate transfers to the original interest of William Klahn, E. W. Bernitt, George Wulff, and David Young in said booms.

16. That the Court erred in finding that the plaintiffs are the present owners of equal shares of said interest in said booms.

17. That the Court erred in finding that the plaintiffs were the owners of such shares during the years 1907, 1908, and 1909.

18. That the Court erred in finding that the defendants C. A. Smith Lumber and Manufacturing Company and Smith-Powers Logging Company assumed and exercised the rights of ownership of said E. B. Dean and Company in said interest in said boom, and said tide lands from and after February, 1907, in conjunction with the plaintiffs.

19. That the Court erred in finding that C. A. Smith is the controlling stockholder in the defendant C. A. Smith Lumber and Manufacturing Company.

20. That the Court erred in finding that the defendant C. A. Smith Lumber and Manufacturing Company has dominated and dominates the defendant Smith-Powers Logging Company.

21. That the Court erred in finding that all the persons and corporations succeeding to and owning the interest of E. B. Dean and Company in said booms, including the defendants C. A. Smith, C. A. Smith Lumber and Manufacturing Company, and Smith-Powers Logging Company have recognized and acted under said agreements so found to exist by the Court.

22. That the Court erred in finding that all the persons and corporations succeeding to and owning the interest of said E. B. Dean and Company in said boom, including defendant C. A. Smith, C. A. Smith Lumber and Manufacturing Company, and Smith-Powers Logging Company have dealt with the plaintiff E. W. Bernitt and his copartner thereto according to and under the terms of said agreement so found by the Court to have been made.

23. That the Court erred in finding that the defendants C. A. Smith Lumber and Manufacturing Company and Smith-Powers Logging Company have expressly recognized the rights and privileges of the plaintiffs.

24. That the Court erred in finding that the defendant C. A. Smith Lumber and Manufacturing Company and Smith-Powers Logging Company consented to the use and operation of said booms by the plaintiffs during the logging season of 1907 and 1908 conformably to said original agreement.

25. That the Court erred in finding that the de-

fendant C. A. Smith Lumber and Manufacturing Company and Smith-Powers Logging Company permitted the use and operation of said booms by the plaintiffs during the rafting and logging operations of 1908 and 1909.

26. That the Court erred in finding that said defendants ousted the plaintiffs in the use and occupation of said booms in June, 1909.

27. That the Court erred in finding that at the time of the ouster of the plaintiffs said booms were of the reasonable value of Two Thousand Dollars.

28. That the Court erred in finding that One Thousand Dollars is a reasonable value of the plaintiffs' interest in said booms.

29. That the Court erred in finding that the interests of the plaintiffs in said booms was irrevocable.

30. That the Court erred in finding that the defendant C. A. Smith Lumber and Manufacturing Company and Smith-Powers Logging Company rendered themselves liable to pay plaintiffs for the reasonable value of their interest in said booms.

31. That the Court erred in finding that the plaintiffs were entitled to an accounting for boomage charges on logs and other timber caught and stored in said booms, and for further charges for logs and other timber by them rafted and transported or transferred to the mills of the C. A. Smith Lumber and Manufacturing Company and the Simpson Lum-

ber Company during the logging and rafting season of 1908 and 1909.

32. That the Court erred in finding that during the logging season of 1908 and 1909 the plaintiffs caught and stored in said boom for said Simpson Lumber Company 4,045,273 feet of logs.

33. That the Court erred in finding that during the season of 1908 and 1909, the plaintiffs rafted and transported to the mill of the Simpson Lumber Company, 2,966,771 feet of logs.

34. That the Court erred in finding that the plaintiffs are entitled to one half of the boomage charges, viz., twelve and one-half cents per thousand feet upon 4,045,273 feet of logs.

35. That the Court erred in finding the plaintiffs entitled to a rafting charge of thirty-five cents per thousand feet upon 2,966,771 feet of logs transported to the mill of the Simpson Lumber Company.

36. That the Court erred in finding the plaintiffs entitled to \$18.93 for piles boomed and rafted.

37. That the Court erred in finding the plaintiffs entitled to \$1562.96 for logs and piles boomed and rafted for the Simpson Lumber Company.

38. That the Court erred in finding that the plaintiffs during the logging season of 1908 and 1909 caught in said booms 1,924,460 feet of logs for the defendant C. A. Smith Lumber and Manufacturing Company.

39. That the Court erred in finding that the plaintiffs rafted and transported 1,924,460 feet of logs to the mill of the defendant C. A. Smith Lumber and Manufacturing Company.

40. That the Court erred in finding that the plaintiffs were entitled to one half of the boomage charge, viz., twelve and one-half cents per thousand feet upon said 1,924,460 feet of logs.

41. That the Court erred in finding that plaintiffs were entitled to rafting charges of thirty-five cents per thousand feet on said 1,924,460 feet of logs.

42. That the Court erred in finding that plaintiffs were entitled to \$10.57 for booming and rafting piling.

43. That the Court erred in finding plaintiffs entitled to \$924.58 from the defendant C. A. Smith Lumber and Manufacturing Company.

44. That the Court erred in finding that plaintiffs were entitled to one half the boomage charge, viz., twelve and one-half cents per thousand feet upon four thousand logs averaging nine hundred fifty feet to the log.

45. That the Court erred in finding that any such logs passed through said boom during said logging and rafting season of 1908 and 1909.

46. That the Court erred in finding that said sum of \$475.00 has been collected and retained by the defendant C. A. Smith Lumber and Manufactur-

ing Company, and the Smith-Powers Logging Company.

47. That the Court erred in finding the plaintiffs entitled to recover from the Smith-Powers Logging Company and the C. A. Smith Lumber and Manufacturing Company, the sum of \$3667.34.

48. That the Court erred in entering a decree herein in favor of the plaintiffs and against the defendants.

49. That the Court erred in ordering and entering judgment herein for costs in favor of the plaintiffs and against the defendants.

50. That the Court erred in entering judgment herein in favor of the plaintiffs and against the defendants in the sum of \$3,667.34.

51. That the Court erred in entering any decree whatever upon the findings in this suit.

52. That the Court erred in not entering a decree herein in favor of the defendant C. A. Smith Lumber and Manufacturing Company, and Smith-Powers Logging Company, and against the plaintiffs upon the findings herein.

53. That the Court erred in not entering a decree and judgment in favor of the defendants and against the plaintiffs for the costs of this suit.

54. That the Court erred in not dismissing this cause as one not cognizable in equity.

55. That the Court erred in not finding herein that the complainants E. W. Bernitt and Victor Wittick have been notified that the defendant Smith-Powers Logging Company took exclusive possession of said boom in question in December, 1908.

56. That the Court erred in not finding herein that after December 20, 1908, the plaintiffs and each of them were ousted of possession of said boom.

57. That the Court erred in not finding that on December 20, 1908, defendant Smith-Powers Logging Company took exclusive possession of said boom, and thereafter continuously maintained possession and control thereof.

58. That the Court erred in not finding that the plaintiffs and each of them had no claim or claims whatsoever, for boomage or participation in the boomage from said boom based upon logs or piling caught or handled therein during the logging season of 1908 and 1909.

59. That the Court erred in not finding that a complete change in said booms was rendered necessary by the requirements of the engineers of the War Department in the summer of 1908.

60. That the Court erred in not finding that in order to legally maintain said booms during and after the summer of 1908, it was necessary to expend a greater sum of money thereon in conforming the same to the requirements of the government engineer.

61. That the Court erred in not finding that

it was necessary in order that said booms catch, hold, handle, and accomodate the logs naturally coming into the same during the logging season of 1908 and 1909 and the subsequent logging seasons that said booms be rebuilt and enlarged and extended.

62. That the Court erred in not finding that it was necessary in order to properly maintain and continue said booms that the owners thereof purchase the lands known as the McIntosh land, and expend therefor the sum of Two Thousand Dollars.

63. That the Court erred in failing to find that it was necessary in order to legally maintain and continue said booms, to purchase the land known as the Devers tide lands, and to expend therefor the sum of \$2250.00.

64. That the Court erred in failing to find that it was necessary in order to continue and maintain said booms to purchase the land known as Holland Island, and to expend therefor the sum of \$2010.50.

65. That the Court erred in failing to find that it was necessary in order to continue said booms to purchase other tidelands, adjacent thereto and to expend therefor the sum of \$1200.00.

66. That the Court erred in failing to find that it was necessary in order to properly maintain said boom and accomodate and hold the logs coming into the same to purchase the tidelands upon which the extension or pocket boom at the end of said lower boom was built and that it was necessary to expend

therefor and there was expended by the defendant Smith-Powers Logging Company therefor, \$7,155.00.

67. That the Court erred in failing to find that there was expended by the defendant Smith-Powers Logging Company, in maintaining, repairing, and conducting said boom, during the logging season of 1907 and 1908, the sum of \$1350.47.

68. That the Court erred in failing to find that necessarily and properly expended by the Smith-Powers Logging Company in maintaining, repairing and conducting said boom in the year 1909 the sum of \$2,247.23.

69. That the Court erred in failing to find that there was the necessary expenses of maintaining and repairing, and conducting said booms expended by the Smith-Powers Logging Company for the years 1907, 1908, and 1909, were and are properly chargeable against said booms.

70. That the Court erred in failing to find that the defendant Smith-Powers Logging Company should be credited as against the complainants with all sums necessarily expended by them in the maintenance and repair of said booms, during any time that the complainants had or were entitled to any interest therein.

71. That the Court erred in failing to find that the sum of \$2010.00 expended by the defendant Smith-Powers Logging Company in settling the claim for the fishing rights at and opposite the Creamery

Boom was a necessary expense of maintaining and conducting said boom.

72. That the Court erred in failing to find that the agreements between the complainants and E. B. Dean & Company constituted a mere working agreement or working interest of the complainants in said booms.

73. That the Court erred in failing to find that the interests of the complainants in said booms were terminable at any time, to the said E. B. Dean and Company by the sale or transfer of said booms.

Wherefore the defendants Smith-Powers Logging Company and C. A. Smith Lumber and Manufacturing Company pray that said decree be reversed, and that said court be directed to enter a decree in full accord with the prayer of their answer in the above entitled cause.

JOHN D. GOSS,
Solicitor for defendants,
Smith-Powers Logging Company
and C. A. Smith Lumber and
Manufacturing Company.

Filed October 24, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on the 24th day of October, 1914, there was duly filed in said Court and cause, a Bond on Appeal, in words and figures as follows, to wit:

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Smith-Powers Logging Company, and C. A. Smith Lumber and Manufacturing Company, as principals, and David Nelson and A. H. Powers, as sureties, are held and firmly bound in the sum of Five Thousand Dollars (\$5,000.00) to be paid to the said plaintiffs, viz., E. W. Bernitt and Victor Wittick, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our executors, administrators, successors, and assigns jointly and severally firmly by these presents.

Sealed with our seals, and dated this the 5th day of September, in the year of our Lord, one thousand, nine hundred, and fourteen.

WHEREAS, the above named Smith-Powers Logging Company, and C. A. Smith Lumber and Manufacturing Company have prosecuted an appeal in the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree rendered in the above entitled suit by the judge of the District Court of the United States for the District of Oregon, entered April 29, 1914, for Three Thousand, Six Hundred, Sixty-Seven and 34-100 Dollars (\$3,667.34), with costs and disbursements amounting to Two Hundred, Thirteen and 05-100 Dollars (\$213.05),

NOW THEREFORE The Conditions of the Obligation are such: That if the above named Smith-

Powers Logging Company and C. A. Smith Lumber and Manufacturing Company shall prosecute this appeal to effect, and answer all damages and costs, if they fail to make their plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Smith-Powers Logging Company,

By A. H. POWERS,

C. A. Smith Lumber and Manufacturing Company,

By DAVID NELSON,

Resident Agent.

Principals.

[Seal]

A. H. POWERS,

[Seal]

DAVID NELSON,

Sureties.

State of Oregon,

County of Coos,—ss.

We, A. H. Powers, and David Nelson, sureties named in the above bond, being first duly sworn on oath depose and say each for himself that I am a resident and freeholder within the State of Oregon, and am worth the sum of Five Thousand Dollars (\$5,000.00) over and above all my just debts and liabilities and exclusive of property exempt from execution and forced sale.

A. H. POWERS

DAVID NELSON

Subscribed and sworn to before me this the 5th day of September, 1914.

[Seal]

HERBERT T. MURPHY,
Notary Public for Oregon.

Approved October 26, 1914. R. S. Bean, Judge.

Filed October 24, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on the 1st day of December, 1914, there was duly filed in said Court, a Statement of the Evidence, in words and figures as follows, to wit:

EVIDENCE.

Come now the parties plaintiff by their attorney W. U. Douglas, and the defendants Smith-Powers Logging Company, a corporation, and C. A. Smith Lumber & Manufacturing Company, a corporation by their attorney John D. Goss, and enter into the following stipulation and agreement:

That the annexed statement of evidence has been agreed upon by the parties hereto as a true and correct statement of the evidence given at the trial of this case, and that the same may be approved by the Court as the statement of evidence to be used on the appeal herein.

It is further stipulated and agreed that the proposed statement of evidence heretofore submitted by the appellants may be withdrawn from the files and

the statement of evidence hereto annexed substituted in its place and stead.

Dated this 27th day of November, 1914.

W. U. DOUGLAS,
Attorney for Plaintiffs.

JOHN D. GOSS,
Attorney for Defendants.

Record approved this Dec. 1st, 1914,

CHAS. E. WOLVERTON,
Judge.

In the District Court of the United States for the District of Oregon.

E. W. BERNITT and VICTOR WITTICK,
Plaintiffs,

vs.

SMITH-POWERS LOGGING CO., a corporation,
C. A. SMITH, C. A. SMITH LUMBER & MANUFACTURING CO., a corporation, and SIMPSON LUMBER CO., a corporation,
Defendants.

**Statement of Evidence on Appeal Prepared by
the Appellant.**

Be it remembered that the evidence in the above entitled suit was taken pursuant to the stipulation of the parties and by order of the Court by and before Annie Smith as special examiner, at Marshfield, Ore-

gon, at various times, commencing on the 10th day of November, 1911, and closing on the 12th day of April, 1913, and that the following is a condensed statement of the evidence essential to the decision of the question presented by the appellee herein and offered and adduced by the respective parties in the trial of this cause:

The plaintiffs to support the issues in their behalf first called as a witness Wm. T. Merchant, who being first duly sworn testified in substance as follows:

DIRECT EXAMINATION.

That he was forty-two years of age, residing at Marshfield and engaged in the general merchandise business; that he was formerly manager of Dean Lumber Company and had been salesman for E. B. Dean & Co; that he knew the handwriting of the several book-keepers of the company; that he had nothing to do with the books of E. B. Dean & Company but knew them when he saw them; that he was acquainted with the book-keepers and had seen them write and had seen the books.

The witness was then shown a book which he stated was the ledger of E. B. Dean & Company starting with January, 1879, and running to December 31st, 1881; that he recognized some of the writing therein as that of C. H. Merchant, his father; that it was one of the books kept by E. B. Dean & Co. starting in January, 1879, and ending December 31st, 1881. The book referred to, (A large folio account book)

(Testimony of Wm. T. Merchant)

was then offered in evidence and over the objection of defendant that it was incompetent, irrelevant and immaterial, and not properly identified and not a book of original entry, was received, and for the purpose of identification was marked "Plaintiff's Exhibit No. 1". The witness then testified as follows:

"Q. You will please examine the account marked "Coos River Boom" on page 272 of Plaintiff's Exhibit No. 1, and state if you know in whose handwriting these entries are made.

J. D. GOSS: I object to this as incompetent, irrelevant and immaterial; and for the further reasons that the witness has not shown himself competent to testify, and the record has not been identified, and appears on its face not to have been a book of original entry.

A. All in the hand-writing of C. H. Merchant.

Q. Was the C. H. Merchant referred to the Manager of E. B. Dean & Company and also one of the partners or members of the firm?

J. D. GOSS: I object to that on the ground that the witness has not shown himself competent to testify, and no foundation has been laid therefor.

A. Yes.

Q. You may state whether or not you are acquainted with C. H. Merchant's hand-writing, or know it.

A. Yes.

Q. You have seen him write, and know it?

(Testimony of Wm. T. Merchant)

A. Yes.

Q. Were you acquainted with the members and partners of the firm of E. B. Dean & Company?

A. Yes.

Q. Who were they?

A. E. B. Dean and David Wilcox.

Q. Who was the other partner?

A. C. H. Merchant.

Q. The firm consisted then of E. B. Dean, David Wilcox and C. H. Merchant?

J. D. GOSS: I make the same objection.

A. Yes.

Q. You will please read the several items in the account of the Coos River Boom, above referred to, appearing on page 272 in Exhibit No. 1.

J. D. GOSS: Objected to for the reason that the same is incompetent, irrelevant and immaterial and on the further ground that it is not proper examination.

A. On September 30, 1881, To merchandise \$30.70

On October 31, same year, To merchandise

182.31

On November, no date, merchandise 2143.62

December 29, Sundries 7.42

2364.05

Credits

November 30, 1881, By 880 feet of plank 50.10

December 29, Sundries 356.59

December 31, Balance, new ledger 1957.36

(Testimony of Wm. T. Merchant)

Q. Do you know in whose hand-writing these entries are?

A. Webster's—I don't remember his initials.

Q. Who was Webster; was he a book-keeper?

JOHN D. GOSS: Objected to for the reason that the same is incompetent, irrelevant and immaterial, and that the witness has not shown himself competent to testify.

A. Yes, he was.

Q. You were acquainted with this man Webster, were you?

A. Yes sir.

Q. Is that his hand-writing?

A. Yes sir.

Q. Do you know what position he occupied with E. N. Dean & Company?

JOHN D. GOSS: Same objection.

A. Yes, he was book-keeper.

Q. During what time, do you know?

A. He went to work for them in 1873 and quit in 1881.

Q. Mr. Merchant, you will please examine page 224 of Exhibit No. 1, particularly that portion marked "Boom Account" and state in whose hand-writing the entries are made.

JOHN D. GOSS: I make the same objection.

A. The account was opened by Webster in January, 1881,—I cannot think of his first name.

Q. You will please read the items mentioned.

JOHN D. GOSS: I object to this as not proper examination.

(Testimony of Wm. T. Merchant)

A. January, 1881—This is written by Webster—

To sundries \$ 7.20

April 30th,—C. H. Merchant's writing—

By cash 20.00

September 30th, 295 lbs. rope—This
is written by F. M. Phipps— \$59.00

Credits.

January 11th, 1881, By logs—Written
by Webster 45.07

Q. You spoke of one of the entries being made by F. M. Phipps, you may state what position F. M. Phipps held with E. B. Dean & Company.

J. D. GOSS: Same objection, and objected to on the further ground that he has not shown himself competent or qualified to testify.

A. He was the first clerk in the store, and afterwards assistant book-keeper under Webster, and afterwards the head-book keeper.

Q. You have seen him write, have you?

A. Yes.

Q. You know his hand-writing?

A. Yes.

Q. Mr. Merchant, I now hand you a book, a journal,—you will please examine the same and state what book that is.

J. D. GOSS: Objected to for the reason that the same is incompetent, irrelevant and immaterial, and on the further ground that the witness has not shown himself competent or qualified to testify regarding the same.

(Testimony of Wm. T. Merchant)

A. It is the Journal.

A. Whose journal?

A. It was E. B. Dean & Company's journal.

Q. Between what dates?

J. D. GOSS: Same objection, and the further objection that this is not the best evidence.

A. Between June 3, 1881, to December 29, 1881.

Q. You identify that book as the journal of E. B. Dean & Company's?

J. D. GOSS: Same objection.

A. Yes.

Q. Can you identify the hand writing in the several entries?

J. D. GOSS: Same objection.

A. Yes, it is F. M. Phipps' hand writing.

Q. You will turn to page 197—

The book referred to is then submitted to the counsel for defendant and then offered in evidence, and for the purpose of identification requests that it be marked "Plaintiff's Exhibit No. 2", of Plaintiff's testimony.

JOHN D. GOSS: Objected to for the reason that the same is incompetent, irrelevant and immaterial, as not properly identified, and as not shown to be a book of original entry.

The book referred to was then received in evidence, subject to the objection, and for the purpose of identification was marked "Plaintiff's Exhibit No. 2".

The witness was then asked to turn to page 197, "Coos River Boom Account" of Plaintiff's Exhibit

(Testimony of Wm. T. Merchant)

No. 2 and state what the articles of merchandise there listed consisted of, and over defendant's objection that it was irrelevant, incompetent and immaterial and not the best evidence, testified to the following items:

"Sundries \$24.70, page 197; spikes \$6.00; total amount \$30.70" The witness also read the following from page 225 of said book: "Oct. 5th, 1881, To 3 pounds rope 60 cents; on 6th, 400 ft. plank \$2.80; on 7th, 1 5-8 inch auger \$1.25; 96 pounds staples a 10 cts. \$9.60; on 7th, 1 beetle \$2.00; 1 pencil 13 cts; On 14th, 1 Ax handle 50 cts; 1 keg 7 inch spikes \$7.50; on 17th, 24 pounds Norway iron staples \$3.00; on the 18th, merchandise, page 369 of day-book, \$39.20; on the 19th, 285 pounds chain \$14.25; 1 7-8 inch auger .88 cents; on the 24th, lumber page 385 of day-book, \$16.60; on the 25th, 2 kegs of spikes \$15.00; on the 26th, merchandise page 389 of day-book \$41.38; on the 29th, 135 pounds rope \$27.00; on the 29th, 80 pounds of rope \$16.00; on the 31st, 130 pounds of rope \$26.00; Total \$182.31".

Witness then turned to page 267 of said Exhibit No. 2 and identified the hand-writing as that of Sam Dean who was book-keeper of E. B. Dean & Company for a short time, and then read from the record the following items:

(Testimony of Wm. T. Merchant)

"On November 4th, to 110 pounds iron staples		\$11.00
14th, To 17 pounds of rope to Noble	3.40	
21st, To 600 feet of refuse plank	3.00	
25th, To sundries, page 468 of day-book	2126.22	
		<hr/>
		\$2143.62

Credit here by 8800 feet plank and refuse 50.10"

And further read into the record from page 332 of said Exhibit No. 2 the following:

"A. This is on December 29th, 1881, Coos River Boom to sundries, page 565 of Day-book \$7.42.

Credits, same account, By sundries, page 564, \$310.62

By Sundries, page 565	45.00
By Sundries, page 566	.97

Total	\$356.59"
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Witness then identified a book shown him, as the Day-book of E. B. Dean & Company between June 1st, 1881, and February 28th, 1882, and testified that it was a book of original entry, and the hand-writing therein was that of F. M. Phipps; witness then referred to page 468 of this book and, over the objection of defendant, read into the record the following:

"On November 25th, 1881, Coos River Boom, Dr.	
To 7,960 feet of boom sticks	\$398.00
To 105 pounds of staples at 10 cents	10.50
398 piles, 15,124 feet at .03	453.72
1500 pounds chain	60.00

(Testimony of Wm. T. Merchant)

Next, same page, Coos River Boom, Dr.

To W. H. Noble, driving 398 piles at \$3. 1194.00

And four days labor 10.00

Total \$1204.00

Same date, Coos River Boom, Credit

By 8,800 feet of plank and refuse \$50.10"

This book was then offered in evidence and marked for the purpose of identification "Plaintiff's Exhibit No. 3".

Witness then stated he could identify the handwriting of C. H. Merchant, W. L. Webster, F. M. Phipps and Sam Dean, and that Dean and Merchant were dead, and he thought Webster was dead, and that no one knew where Phipps was.

Witness further stated that he was familiar with the boom in controversy, and the particular boom for which the items referred to was the Old Creamery Boom directly across from the Creamery at the mouth of Coos River.

The several books offered in evidence were each of them objected to by the defendant as incompetent, irrelevant and immaterial, and not books of original entry, and that the witness had not shown himself competent to testify regarding the same.

Witness was then shown a large book which he stated was the Day Book of E. B. Dean & Company from March 1st to December 30th, 1882, which he stated was a book of original entry kept during that time. The book was then offered and received in

(Testimony of Wm. T. Merchant)

evidence and marked for identification "Plaintiff's Exhibit No. 4".

Witness was then shown another large book which he identified as the Ledger of E. B. Dean & Company for 1882, and testified that it was kept by two different book-keepers, F. M. Phipps and Sam Dean. This book was then offered and received in evidence as "Plaintiff's Exhibit No. 5" herein.

Witness was then asked to examine the account of the Coos River Boom on page 272 of Plaintiff's Exhibit No. 1, and stated that the items sundries \$356.59 would be explained by the Journal of December 29th, 1881, on page 322. Witness was then handed Plaintiff's Exhibit No. 3 and asked to explain the entries on page 564 thereof. He then stated that it was part of the items making up the \$356.59 in the ledger, which items were then read by the witness over the objection of the defendant:

"December 29, 1881, To Boom account,	
boomage	\$32.41
Young & Wulff, rafting credit	32.41
Mill account, same date, to Boom account,	
25 logs, 14,856 feet at 4.50	\$66.85"

Witness testified that the credits were given, one to Young and Wulff, and the other from the Mill Account to the Boom:

"December 29th, to Boom account,	
boomage,	\$21.31
Young & Wulff \$21.31—they were given credit	
with that amount".	

(Testimony of Wm. T. Merchant)

Whereupon the witness further testified as follows:

“This I don’t believe we figured up (Referring to another item). There are three items: \$316.94, \$119.74 and \$32.41, and there must be some more,— These items amount to \$469.09.

Q. See if you can find them.

A. It is a credit to the Boom from the Mill of December 29th and 30th that is carried forward.

Q. You may please state the amount that is carried forward.

Mr. GOSS: Same objection.

A. The amount carried forward is \$1957.36.

Q. I hand you plaintiff’s exhibit No. 5, and ask you to examine page 18 and state whether this is—the first item—the amount brought forward.

Mr. GOSS: Same objection.

A. Yes, this is the amount brought forward.

Q. You will please read the several items of this account.

JOHN D. GOSS: Same objection.

A. January 2, 1882, 256 pounds rope	\$51.20
January 10th, 76 pounds of 7-8 iron	4.56
January 13th, 100 pounds ship spikes	7.00
January 19th, Sundries, page 619-621	10.35
January 20th, Adz and handle	4.25
January 24th, Keg of spikes	6.50
January 26th, Donald McIntosh	6.00
January 23rd, by credit Mill account	\$256.15
February 3rd, Sundries, page 659 in	
Journal	1791.07

(Testimony of Wm. T. Merchant)

Q. Do you know what items these sundries consisted of?

JOHN D. GOSS: Same objection.

A. I don't know—It should be in the Journal, there, February 3rd, 1882.

Q. I hand you Plaintiff's exhibit No. 3, and ask you to examine page 659 and see what you can ascertain from that.

JOHN D. GOSS: Same objection.

A. Coos River Boom credited by	\$1791.07
Debits are Mill account	895.53
Young & Wulff	895.53

Which makes a total of \$1791.07"

Witness testified that these were the items for constructing the Coos River Boom, and then was asked to explain the entries on page 800 of Plaintiff's Exhibit No. 4, to which he answered as follows:

"Boom Account is debited for one-half balance	\$302.69
Young & Wulff one-quarter balance	151.35
Klahn & Bernitt one-quarter balance	151.35

The next entry is Klahn & Bernitt

By Young & Wulff, one-quarter boom \$750.00"

Witness was then shown a large book which he identified as the Ledger of E. B. Dean & Company from February, 1885, to June, 1887, and as being in the hand-writing of Mr. Bischoff, who was book-keeper; that he had seen him write and knew his hand writing and that the book was the Ledger of the firm at that time, which was then offered in evidence

(Testimony of Wm. T. Merchant)

and received as "Plaintiff's Exhibit No. 6". Witness was then asked to examine page 111 of Plaintiff's Exhibit No. 6 and state whose account appeared on that page, to which he answered

"I have an idea that this book refers to both booms during the years 1885, 1886 and 1887", explaining that by both booms he meant the Upper Boom opposite the Creamery, and the Lower Boom in the main or Old North Bend Channel of the river. He was then asked to segregate the construction account from the general expense account and point out the particular items, to which he answered as follows:

"Deubner & Company earned on January	
9th, 1885,	31.50
February 4th, 24 pounds of rope	4.80
February 7th, 77 pounds staples	7.70
February 24th, 30 pounds of spikes	1.50
March 20th, Hyde & Noble driving piles	630.00
39 pounds of chain	3.90

Then sundries—I don't know what they are

December 14th 104 pounds of chain	\$10.40
December 31st, Deubner & Company for	
blacksmithing	2.48
September 24th, 1886, 34 pounds spikes	2.04
And 24 pounds staples	2.40
469 pounds of rope	70.35
January, 1887, Sundries	271.00

That this is about all I see that would go into Construction"

(Testimony of Wm. T. Merchant)

The witness then identified a large book as the Journal of E. B. Dean & Company from July 1st, 1884, to June 30th, 1885, and that the same was in Bischoff's hand-writing, and that he knew it to be a Journal of original entries as kept by the firm. The book was then received in evidence as "Plaintiff's Exhibit No. 7". Each of these books was received over the objection of the defendant, that the same was incompetent, irrelevant and immaterial and not properly identified.

Upon cross examination the witness testified that he was twelve years of age in 1881 and had helped around the store of E. B. Dean & Company during his vacations, and knew the different book-keepers except Webster, knew their hand-writing from away back, but knowledge of the books came from subsequent connections with the books while C. H. Merchant was Receiver and while witness was employed by Dean Lumber Co; that he was not very familiar with the book-keepers or with their hand-writing at the time, but had since become familiar with the hand-writing by having to refer to the books; that he knew Mr. Webster's hand-writing by reason of its being pointed out to him by C. H. Merchant who was Receiver of E. B. Dean & Company from 1889 to 1903, during which period witness worked for him as book-keeper and for several years afterwards as Manager of the Dean Lumber Company.

Thereupon plaintiffs called as their witness John

(Testimony of John C. Merchant)

C. Merchant, who being first duly sworn testified in substance as follows:

That he was a son of C. H. Merchant, one of the members of the firm of E. B. Dean & Company which consisted of E. B. Dean, David Wilcox and C. H. Merchant; that he remembered the partnership from about 1885; that the books theretofore placed in evidence were secured by him some three years before from the old warehouse of E. B. Dean & Company; that he was not familiar with the hand-writing of the book-keepers, but was acquainted with F. M. Phipps and knew he was a book-keeper for the firm in the eighties, but that he was employed by C. H. Merchant, Receiver of E. B. Dean & Company, from 1899 to 1904 and during that time these books were in the back office of E. B. Dean & Company. Witness was then shown Plaintiff's Exhibit No. 1, which he testified was one of the books of E. B. Dean & Company, and referring to page 272 of said exhibit stated that he thought it was in the hand-writing of Mr. Phipps; that he was personally acquainted with Mr. Phipps and had never seen him write, but thought he was a book-keeper of E. B. Dean & Company at about that time. The witness then testified that he was familiar with book-keeping and book-keeping methods; that the Plaintiff's Exhibit No. 2 was the Journal of the daily events and transactions of E. B. Dean & Company in 1881; that the first item on page 272 of the Coos River Boom account amounting to \$30.70 consisted of \$24.70 in sundries

(Testimony of John C. Merchant)

and \$6.00 for a keg of spikes; that he thought he could tell what the item "sundries" consisted of by looking at the other books; that Plaintiff's Exhibit No. 3 was a Day-book of E. B. Dean & Company during 1881, and that on page 310 thereof under the item "sundries", the items comprising the entry of \$24.70 above referred to consisted of 3100 feet of three inch plank \$21.70 and 1000 feet of refuse \$3.00; that the next item on page 272 of Plaintiff's Exhibit No. 1 referred to page 225 of Plaintiff's Exhibit No. 2, and that the items were as follows:

"To 3 inch rope 60 cents, 400 feet plank \$2.80, 1 5-8 anger 1.25, 96 pounds of staples \$9.60, 1 beetle \$2.00, 1 pencil. 13 cents, 1 ax handle 50 cents, 1 keg 7 inch spikes \$7.50, 24 pounds of Norway iron staples \$3.00, merchandise, page 369 of the Day-book, \$39.20, 285 pounds chain \$14.25, 1 7-8 auger .88 cents, lumber page 385 of day-book, \$16.60, 2 kegs of spikes \$15.00, merchandise \$14.38, 135 pounds rope at 20 cents, 80 pounds rope \$16.00, 130 pounds rope \$26.00".

Making a total of \$182.31, which corresponded with the entry.

The attention of witness was then called to the next item in Plaintiff's Exhibit No. 1, page 272, Coos River Boom account, the figures \$2143.62, and referring to page 267 of Plaintiff's Exhibit No. 2 stated that the items appearing under the head of Coos River Boom consisted and made up the items entering into that charge; that the item Sundries appearing

(Testimony of John C. Merchant)

on page 267 of Plaintiff's Exhibit No. 2 was explained by referring to page 468 of the Day-book, Plaintiff's Exhibit No. 3,—and that the items were as follows:

“On page 468 I find the account of Coos River Boom and to that is charged 7,960 feet of boom sticks \$398.00, 105 pounds staples \$10.50, 398 piles \$453.72, 1500 feet of chain \$60.00, for driving of piles by W. H. Noble \$1194.00, and for four days labor \$10.00. And Coos River Boom is credited by 8,800 feet of plank and refuse, \$50.10”.

The witness then testified that the next item appearing on page 272, Coos River Boom account of Plaintiff's Exhibit No. 1, was a charge of \$7.42 to sundries, which could be explained by referring to page 322 of the Day-book; that the total charge of account was \$2364.05; that the right hand side of the account were credits; that the first credit was for plank furnished the boom, and the next item of credit was explained by referring to page 322 of the Journal, Plaintiff's Exhibit No. 2, where there was a credit of \$356.59 by Sundries, which referred to pages 564, 565 and 566 of the Day-book, Plaintiff's Exhibit No. 3 herein. Witness then referred to said pages of said Exhibit No. 3 and testified as follows:

“I find on page 564 a credit of \$158.47, also \$119.74, and also \$32.41; on page 565, \$21.31, \$17.09, \$3.71, 13 cents, \$1.72 and 86 cents; and on page 566 20 cents, 28 cents, 49 cents.”

(Testimony of John C. Merchant)

and these items were credited to the account of Wulff and Young.

Witness was then shown Plaintiff's Exhibit No. 5 which he testified was the Ledger of E. B. Dean & Company for the year 1882, and referring to page 8 thereof testified that he could explain the items going to make up the credit there appearing, \$1791.07. Witness was then shown Plaintiff's Exhibit No. 3, which he testified was the Day-book of E. B. Dean & Company, and referring to page 659 thereof testified that the items "Boom C. River" went into the said item of credit in Plaintiff's Exhibit No. 5; that the Boom account was credited by the Mill Account with \$895.53 and also by Young and Wulff \$895.54 being a credit to Coos River Boom and a charge to Wulff and Young.

Witness then referred to Plaintiff's Exhibit No. 5, page 163, and stated that the same appeared to be the account of Bernitt and Klahn and that he found a debit entry under date of December 30th of \$750.00; that by referring to the other exhibits of plaintiff he could tell what this item was and that from Exhibit No. 4 on page 800 there was a debit to Klahn and Bernitt and a credit to Young and Wulff of \$750.00 for a quarter of the boom. Witness was then shown Plaintiff's Exhibit No. 6 which he stated was the Ledger of E. B. Dean & Company and that on page 111 thereof he found the account of the Coos River Boom for the year 1885. Witness was then shown Plaintiff's Exhibit No. 7 which he stated was the

(Testimony of John C. Merchant)

Journal of E. B. Dean & Company for 1884 to June 30th, 1885; that the items appearing under the title of Sundries on page 111 of Exhibit No. 6 were shown by entries on page 510 of Plaintiff's Exhibit No. 7 to be a credit to the Boom by logs or boomage on logs; that the next item on page 111 under date May 7th appeared on page 515 of Plaintiff's Exhibit No. 7, to be a credit of \$107.68 for logs passing through the boom; that the item of May 8th on page 111 of said Exhibit No. 6 was shown by page 517 to be Coos River Boom Account to account, one-half interest \$701.10, to George Wulff one quarter interest \$350.55 and to William Bernitt \$350.55.

Upon cross examination witness testified that he knew nothing of his own knowledge as to the several items in the books examined by him or when or by whom they were made, and that he knew nothing about the books during the time E. B. Dean & Company had them, and didn't know of his own knowledge what books were kept by E. B. Dean & Company, and upon re-direct examination stated that during the time his father was Receiver he had occasion to look over the books a number of times but during the time of E. B. Dean & Company he knew nothing about them and knew nothing about the boom account during that time; that since he took possession of the books he had looked through them a number of times, and that the Coos River Boom account did not appear in any other boom account than that mentioned, and that he had knowledge

(Testimony of George Wulff)

of the boom account kept during the time his father was Receiver from 1899 to 1904, and that during that time when he was acting as a clerk under his father, merchandise obtained for the boom was, to his knowledge, charged to that Boom account.

George Wulff was then called as a witness on behalf of the plaintiff and after being first duly sworn, testified in substance as follows:

That he was seventy-four years old, had lived in Marshfield for forty-one years and had been acquainted with the Coos River Boom during all that time; that the Creamery Boom was built in 1881 and the Lower Boom two or three or four years later; that the booms were built by Dean & Company and the raftsmen, David Young first, and Bernitt and Klahn afterward; that the Lower Boom was built by Dean & Company and by Klahn and Bernitt and Young and Wulff; that he did not know exactly the proportion each paid, but Dean & Company paid one-half, and he thought Wulff and Young one-half first off, and then were Klahn and Bernitt one-fourth afterward; that he did not remember what Young and Wulff paid as things had slipped his mind, but that Klahn and Bernitt came, and he was not sure whether it was the next year and in another place, that he did not know exactly, but thought it was in a year or two after the others started; that the agreement was the raftsmen were to get the rafts out and do all the rafting for twenty-five cents a thousand and for catching logs in the boom another

(Testimony of George Wulff)

twenty-five cents; that of the last twenty-five cents the mill company took one-half and the raftsmen one-half; that he thought they (Klahn & Bernitt) gave them credit for their part of the boom; that witness bought out Young and then sold to Haglund and Mattson some time in 1884 or '85 or '86 for \$2400.00 including the rafting gear, etc., which figured in at about \$1200.00 or \$1500.00, and that it was after the lower boom was built.

Witness further testified that his partner, David Young, attended to the business transactions; that he did not consult with Dean & Company when he bought out Young or when he sold; that Dean & Company knew what was going on when he sold out because Mattson & Haglund spoke to them about it; that Dean & Company rendered statements from time to time and he thought the raftsmen were credited for their time spent in keeping the boom in repair.

On cross examination the witness testified that personally he didn't have anything to do with making the original bargain with E. B. Dean & Co. and never talked with any of the members of the firm about it; that he never made any agreement or transfer in writing with Dean & Company and did not remember getting or giving any bill of sales from Young, or to Haglund and Mattson; that he bought out Young for \$1200.00 including all the rafting gear, boats, etc, and bought and sold without personally getting Dean & Company's consent, but that Mattson

(Testimony of George Wulff)

and Haglund talked with Dean & Company about it.

Witness further testified that when he sold out the boom was full of logs and the men who bought took over those logs and the work on them and the rafting of them and received the pay therefor; that they did not consider the investment in the boom apart from the rafting gear; that the rafting gear was only worth \$1200.00, and in fixing the price at \$2400.00 they figured the whole thing together, and that nothing was ever said by him about being partners therein, but something was said between Young and E. B. Dean & Company, the particulars of which he did not know. Witness was not very certain about many of the matters testified to and testified that his memory was not what it ought to be any more.

Witness further testified that he had seen the booms lately but would hardly recognize them as they had all been rebuilt and changed over; that the catching and storing of logs was run together and one-half went to Dean & Company and the other half to the raftsmen, and when Klahn and Bernitt bought in there was no separate agreement entered into and no written agreement was ever made.

Upon re-direct examination the witness testified that while he owned an interest in the boom repair work was done thereon every fall; that there were some old piling there, and piling will remain good

(Testimony of E. W. Bernitt)

in that locality for eight or ten years,—hardly that, but he did not know exactly. He further testified that when he sold to Haglund and Mattson they called the rafting gear worth half the price, but considered the whole business to-gether and that they could make the price of the boom that season out of the rafting of the logs in the boom; that he did not remember what he ever made out of the interest in the boom in a year; that it might have been one hundred dollars, but he couldn't say, and he thought Klahn and Bernitt were partners in 1889 and owned the other one-fourth interest therein.

Whereupon, to further support the issues in their behalf, E. W. Bernitt, one of the plaintiffs was called as a witness, who being first duly sworn, testified in substance as follows:

That he was a raftsman, fifty-six years of age, and had lived in Marshfield thirty-five years; that he knew the property in controversy as being the booms at the mouth of Coos River; that Dean & Company and Wulff and Young started and built the boom, and the Upper Boom was nearly completed when C. H. Merchant asked Klahn and the witness if they would go in with them, saying that he intended to build the booms,—had to build them,—and he thought it would cost him too much to operate them and for that reason he would take the raftsmen in with him; that Mr. Wulff and Young were working over there then and Mr. Merchant was kind of engineering the job; that Mr. Merchant told the witness that

(Testimony of E. W. Bernitt)

Young and Wulff had agreed to take a half interest in the boom but that two men were not enough to operate it and for that reason he thought it would be better for the witness and Klahn to go in with him and take a one-fourth interest and let Wulff and Young have the other one-fourth.

Witness further testified that they might have talked with Wulff and Young but nothing particular, but they seemed to be willing to allow the deal; that at first the witness was opposed to going in, but a couple of months afterwards, that is in the fall of 1881, he and Young decided to go into the deal. Witness further testified that Dean & Company paid all the bills for construction, but one quarter of the cost was charged up to Klahn and Bernitt, that they were charged with \$750.00; that they continued to operate the boom from that time up to 1908 but that Klahn sold his interest to the witness in 1883 or 1884, giving a bill of sale therefor. That over the objection of the defendant that it was incompetent, irrelevant and immaterial, the bill of sale was offered and received in evidence and marked "Plaintiff's Exhibit No. 8"

PLAINTIFFS' EXHIBIT NO. 8.

This witnesseth that William Klahn, the party of the first part, for the consideration of the sum of twelve hundred (\$1,200.00) dollars to him paid, has bargained, sold, quit-claimed and delivered unto E. W. Bernitt his heirs and assigns for-ever, all of the

(Testimony of E. W. Bernitt)

following described property to-wit: An undivided one half interest in and to all of the personal property now owned and up to this date in use by the firm of Klahn & Bernitt in the business of rafting on Coos Bay, Coos Co., Oregon, and the same property being now in the possession of said Bernitt who retains the possession thereof by virtue of this agreement.

And the said W. Klahn for the consideration afore-said has and by these presents does bargain, sell and quit-claim unto said Bernitt any and all interest of whatsoever nature which the said W. Klahn has in and to certain booms for holding logs located near the entrance to Coos River and any and all interest which the said W. Klahn has in and to the land upon which the same is situated together with the right to apply to the proper parties for a deed for the same and to receive any title to said property in the name of said E. W. Bernitt his heirs or assigns; provided however that the said Bernitt shall bear any and all expense necessary to enforce the same.

Dated at Marshfield, Coos County, Oregon, this 27th day of September, 1884.

W. KLAHN

In presence of

J. W. BENNETT

G. A. BENNETT

Filed Jun, 9, 1913

A. M. Cannon

Clerk U. S. District Court.

(Testimony of E. W. Bernitt)

Witness then testified that the Lower Boom was constructed by the same parties as the Upper Boom but some two or three years later, and was three or four years in building, and that one-fourth of the cost was charged to the witness; that the arrangement under which the boom was operated was that the interested raftsmen were to do the rafting at a certain figure and were to catch the logs and operate the booms without charge for their time; that twenty-five cents per thousand was the boomage charge for catching the logs, etc., which charge was paid by the loggers, that the rafters were to get half of it; that repairs were paid for by the company and charged to the boom, and if the boom ran behind the rafters had to pay the balance, that is it was charged to their individual accounts. Witness then testified that if there were no earnings from the boom, or the earnings were not sufficient to meet the cost, the difference was charged to the individual account of the raftsmen interested. Witness further testified that he had not parted with his one-fourth interest in the boom, and further as follows:

“Q. Mr. Bernitt, you may go ahead and state what conversation, if any, you say you had with C. H. Merchant at the time you say you entered into this agreement with him in regard to the use of the land, the proportion you were to receive for the boom, or just how the earnings of the boom were to be divided, how the expenses of maintenances, construction and other matters were to be divided.

(Testimony of E. W. Bernitt)

Mr. GOSS: Objected to as incompetent, irrelevant and immaterial.

A. Mr. Merchant he met Mr. Klahn and me in the store and he told us he intended to put in a boom in Coos River, but he couldn't see his way clear, that it would cost him too much to operate it and that he would take some of the rafters in with him to build it and that they could operate the boom and that they were going to do the rafting to the mills. He said that he had bought land from Mr. McIntosh to secure the boom rights over there and that we could agree upon a price for boomage and a price for rafting, that we should do the rafting for all time, and the boomage, after the expenses was taken out, was to be divided.

Q. Did he say who was to hold the title to the land, pay the taxes and the cost and expense of maintaining the boom?

A. Well, he was going to keep a Boom account and charge the cost and the expenses of the boom up to that account, and charge all the logs up for twenty-five cents a thousand and credit that to the boom.

Mr. Goss: I object to this as incompetent, irrelevant and immaterial, and move to strike out the answer as not responsive.

Q. (Same question repeated)

A. The land there was nothing more said about.

Q. Now, what took place after that, Mr. Bernitt?

A. Well, we decided not to go into it, Mr. Klahn

(Testimony of E. W. Bernitt)

and me, and they went along then and built the boom. He told us at the time that Mr. Wulff and Young were going to take a half of it, but he thought two men wasn't enough to operate it and he wanted us to go into it, making four men. Then they went along and built the boom, and I think it was two months afterwards we met them in the store one day.

Q. Do you mean two months after the conversation?

A. Yes two months after the conversation; the boom was pretty near completed then and he started in again to urge us on to go into it, and then we decided to go in.

Q. What do you mean by going in?

A. To take a quarter interest.

Q. Did you take a quarter interest in it at that time?

A. It was about the time the logs was coming then, that is the boom was so near completed that we could use it, and we went over there then, and it was only a week or so after that the logs came and we went to work over there.

Q. That is with reference to the Upper Boom?

A. Yes, opposite the Creamery.

Q. Now, in regard to the Lower Boom, did Mr. Merchant at that time tell you whose land the log boom was on or would be constructed on, or whose lands you had constructed it on?

A. Well, we seen that the Upper Boom wasn't large enough so Mr. Merchant said one day that

(Testimony of E. W. Bernitt)

we ought to extend the booms down below, that he would secure the boom rights down there, and as I understood it he took a lease from Mr. Holland for a certain piece of ground over there and got the boom right.

Q. Was that Lower Boom increased in size subsequently, while you were in possession of it?

A. No.

Q. Did you know anything about Merchant acquiring title to it subsequently for Dean & Company?

Mr. GOSS: Objected to as incompetent, irrelevant and immaterial.

A. Well yes, there was Mrs. Loubre she owned some land on the west side of that North Bend channel and she wanted to get paid for us having boom sticks strung along there, and I believe through her attorney, Mr. Bennett, she kept notifying Mr. Merchant to pay rent or else take the sticks away from there, so finally—I couldn't tell what year, but it was several years after— Mr. Merchant was down to San Francisco and when he came back he told me that he had made a settlement with Mrs. Loubre about that land.

Q. Was part of the boom and boom-sticks on this land?

A. Yes, supposed to be.

Q. Now, how long did you continue to operate these booms up to, from the time you have indicated in your testimony since making the arrangement with Mr. Merchant or E. B. Dean & Company?

(Testimony of E. W. Bernitt)

A. Up to when?

Q. Yes.

A. Up to 1908—up to the spring of 1908.

Q. Now, was there times when these booms ran behind?

A. There were.

Q. That is certain years?

A. Yes. I can't give the years though.

Q. Was there any expense attached to them?

A. There was the same expense attached to them every year because we always had to repair in the fall of the year, buy new rope and chains, and every year part of the chains and rope had to be renewed.

Q. Did you repair them every year?

A. Every year they were repaired.

Q. Now, when the booms did not pay a sufficient amount to cover the expenses, who paid it?

A. We did.

Q. Please state who you mean by "we".

A. Well, myself and Wulff, Mattson and Haglund, Mr. Anderson of North Bend and me, and Wittick and me, whoever were partners in that boom had to pay".

Witness further testified that the booms are constructed of piles driven on each side of boom sticks run between them, with dolphins at the ends of the boom and sheer booms to catch the logs; that the Upper Boom is opposite the Creamery and on land that is covered with water at ordinary high tide and is partly uncovered at ordinary low tide, and nearly

(Testimony of E. W. Bernitt)

all uncovered at extreme low tide, while the inside of the boom along the shore is only covered at high tide; that the Lower Boom is in the North channel of Coos River that runs off through the mud flats; that as at first constructed the boom at this point took in the whole channel and whenever the boom was in use the entire channel was blocked, but after Mr. Powers took hold of it he split the channel.

Witness further stated that the plaintiffs had possession of the boom up to the Spring of 1908 and considered that they owned a half interest in it, and considered that it was theirs yet.

Witness further testified that the plaintiffs kept the boom in repair, operated it, caught logs and delivered them and when the season was up took care of everything, and while engaged in rafting had scows there at the boom to live in; that the ordinary rafting and booming season would commence about Christmas time and last until March, but that it sometimes started in as early as November, and it had lasted as late as the fore part of April.

Witness further stated that the plaintiffs were rafting logs in 1906 and 1907 and were at the boom rafting logs the entire month of February, 1907, that is making up rafts and towing them away.

Witness further testified as follows:

“Q. Have you ever had any conversation with Mr. A. H. Powers concerning these booms?

A. We have had at several times, yes.

(Testimony of E. W. Bernitt)

Q. Do you know the date of the first conversation, approximately?

A. No.

Q. Do you know what year it was in?

A. No I don't know.

Q. Was it in the year 1907?

A. Well, I can't say whether I met Mr. Powers during 1907 or not.

Q. Do you think it was 1908?

A. I am positive.

Q. That you had a conversation with him during that year?

A. Yes.

Q. Do you remember the substance of your first conversation with him?

A. Not particularly. We went over there and looked at the booms and he said that while it was a fact that people objected to having that channel closed, and it had to be fixed so that the channel had to be kept open, and I think Mr. Powers had surveyors over there surveying the ground, with the view, I supposed, of extending the boom.

Q. Do you know whom Mr. Powers claimed to be representing at that time?

A. Well, I kind of thought I did.

Q. Did he say anything to you as to whom he was representing?

A. The Smith Lumber Company. He didn't say that, but I think that I was introduced to him.

Q. Did you have any conversation with Mr. Powers at this particular time?

(Testimony of E. W. Bernitt)

A. No nothing more except we looked over things there.

Q. Did you tell him of your claim of interest in the boom?

A. Well he said it himself, that Mr. Smith wanted him to take that boom and this logging concern over, I believe. But he said that he would not do it as long as Wittick and I were interested in it.

Q. What was Mr. Powers' apparent position with with reference to Mr. C. A. Smith or the C. A. Smith Lumber & Manufacturing Company at that time.?

A. I don't know, I suppose he was Superintendent of the logging camps.

Q. And the logging department?

A. I suppose.

Q. Did you ever have any conversation with Mr. Powers on the subject of those booms about that time?

A. No not then. We came back again and I don't think we had any more conversations with them during 1907.

Witness further stated that in February, 1908, Mr. Powers came over to the boom and said that Mr. Devers and others were liable to bring suit against them for obstructing the channel and urged the plaintiffs to get the boom empty as soon as possible; that afterwards Mr. Powers said he had settled the suit with Devers and that the loggers were to pay ten cents a thousand for whatever logs they had in the boom and that witness then ascertained what each

(Testimony of E. W. Bernitt)

of the loggers was paying, amounting approximately in the aggregate to \$840.00 and thereupon agreed that he and the plaintiff Wittick would pay fifty dollars apiece for the settlement of this suit.

Thereupon witness was shown a writing which he identified as a statement received from the Smith-Powers Logging Company showing a charge of fifty dollars which went toward the damage suit, which paper was then received in evidence, over defendants' objection, and marked "Plaintiff's Exhibit No. 9".

Witness stated that this conversation with Mr. Powers occurred in the Spring of 1908 and that the boom at the time was empty; that during 1907 and 1908 the plaintiff handled the boom and the rafting and collected as usual theretofore, and that no one else was in possession except himself and Wittick. Witness then testified that he explained to Mr. Brown, the book-keeper for the Smith-Powers Logging Company, how Dean & Company had kept the books and instructed him that he should credit the boom with twenty-five cents a thousand for logs going through the same and a quarter of a cent per lineal foot for piling, and charge up all the material and all the labor, including the labor of the interested raftsmen, that is as to maintenance of boom or keeping it in repair only, and when the settlement was made Mr. Brown stated that the boom was about forty dollars ahead for the year, but that there were some bills to come in that would about square it up.

(Testimony of E. W. Bernitt)

Witness further testified that in the latter part of the summer or fall of 1908, just before the logs came out, he believed, Mr. Powers first claimed that the plaintiffs owned nothing in the boom, that at that time he had the witness and Mr. Wittick up to the company's office and said that the plaintiffs had nothing more to do with the boom; that Mr. Oren was there and asked the plaintiffs why, if they owned an interest in the boom, they were paying rent for it, claiming that the plaintiffs had left about \$600.00 rent for the boom at North Bend, but that the witness then told Mr. Oren that he was mistaken, that that money was part of the boomage charged the loggers at 12½ cents.

Witness further testified that he met Mr. Mereen of the C. A. Smith Lumber & Manufacturing Company on a Sunday in the Spring of 1907 on the wharf in Marshfield, at which time Mr. Mereen stated that he understood that the witness and a party in North Bend claimed a half interest in the boom, to which witness had replied that they did, whereupon Mr. Mereen had said that that was no way to have it, that they had to own it all or none; that he was sure that was prior to the rafting season of 1907 and 1908.

Witness further testified that the plaintiffs had originally paid \$750.00 for the quarter interest in the first boom, as near as he could remember, but that they had some credits by earnings that were deducted, but that he had lost track of the Lower

(Testimony of E. W. Bernitt)

Boom as they were so many years in building it; that Klahn was a partner when they started to build the Lower Boom; that the quarter interest was charged to the witness after he had bought Klahn out, and that at the time he made the purchase he did not notify Dean & Company, but that Mr. Merchant certainly knew of the sale for the witness thought it was paid for by a credit to Klahn's account on the company's books.

Witness further testified that during the latter part of January and during February, 1903, the rafters were catching logs at the boom and were living part of the time in this scow tied up at the boom; that it took about two weeks to raft two thousand logs and about five weeks to raft five thousand logs, depending on how much drift comes down with the logs; that the raftsmen had worked over there a whole week without getting out over three or four hundred logs and that one year they only got out two rafts of two hundred fifty to three hundred fifty logs in three months; that the plaintiffs had charge of the boom in the year 1907 and 1908 and in the fall of 1908 they had the first conversation with Mr. Powers about the ownership of the boom; that the Smith-Powers Logging Company caught the first logs that came down that fall; that whenever logs were turned loose above tide water they were sent word to be over and catch them, but this time they were not notified, and the witness asked them what they meant by cutting plaintiffs out that way, where-

(Testimony of E. W. Bernitt)

upon Mr. Powers told the witness to bring Mr. Wittick up to the office and talk it over; that at the office the witness explained that they had built the booms and paid for them and claimed a one-half interest in them, and that Mr. Powers finally said, "I tell you right here that you haven't anything more to do over there" and said that they had no interest in the booms; that soon after another freshet came and the plaintiffs were up the North Fork of Coos River trying to raft logs for Mr. Gould; that Mr. Gould was anxious to get the logs to the mill and said that if Mr. Powers would let the plaintiffs raft the logs from the boom he would turn them loose; that there-upon Gould saw Mr. Powers who stated that if they would raft the logs for thirty-five cents per thousand it would be all right to turn them loose; that thereupon witness went down to the boom and found plaintiff Wittick's men had the Upper Boom open, and Mr. Wittick then told him that Mr. Powers had come over and got him to help open the Lower Boom; that that night the Gould logs came down and Mr. Powers asked the witness to try to bring over two rafts the next morning; that the next morning at daylight he found Powers there with a crew of men; that Mr. Powers worked with a crew of men and two gasoline boats belonging to the Smith Company for several days getting out a raft; that outside of the crew Mr. Powers had, the witness had two men and Wittick had two men most all the time; that plaintiffs were there with their crews most of the time but there was no arrangement in regard

(Testimony of E. W. Bernitt)

to paying for rafting and catching logs, the witness' understanding being that plaintiffs were getting the same pay they always had; that nothing was said to the contrary except Mr. Powers' statement at the office, and that the plaintiffs never got a cent for the work; that when witness called for a statement Mr. Brown, the company's book-keeper, told him to bring in a statement of his time, whereupon the witness answered that he never worked by the day and Mr. Brown asked what difference it made so long as witness got money enough out of it, but witness refused to bring in a statement of his time.

Witness further testified that Mr. Simpson told him that Mr. Powers had tried to collect all the boomage and rafting amounting to the sum of \$2400.00 but that he refused to pay it, saying it belonged to Bernitt and Wittick, that Mr. Powers had then said that the plaintiffs were working by the day and he would settle with them, whereupon witness told Mr. Simpson not to pay to Mr. Powers but to keep the money until they had settled, but that he didn't think he had ever seen Mr. Powers about it; that thereafter he met Mr. Powers and asked him what he meant by going to North Bend and trying to collect that money, that they were both a little mad and he told him they would have to get it in Court, and Mr. Powers said if you want it that way, go ahead, and Mr. Powers then wanted witness to bring in his bill by the day and he refused, and told Powers he was entitled to thirty-five cents per thousand

(Testimony of E. W. Bernitt)

for rafting and one-half the boomage, and Mr. Powers had finally drawn the money from Simpson.

Witness further testified that the prices were all established when the boom was built, the agreement being made between Mr. Merchant, Klahn, the witness, Mr. Wulff and Young, that the rafting to Marshfield should be twenty-five cents a thousand and the Bay City Mill and North Bend Mill thirty-five cents a thousand; that the boomage was collected separately, one half credited to the raftsmen and one-half to Dean & Company, but that the Simpson Lumber Company credited the raftsmen with $47\frac{1}{2}$ cents for every thousand feet they took to its mill and credited $12\frac{1}{2}$ cents for every thousand feet to the Smith Company; that for the season ending in the Spring of 1908 this $12\frac{1}{2}$ cents was so credited upon the books of the Simpson Lumber Company. The witness then identified a paper as being a statement of the account of the Coos River Boom dated January 1st, 1888, which had been given to him by the book-keeper in the office of Dean & Company and had remained in his possession ever since. This statement, over the objection of the defendant that it was incompetent, irrelevant and immaterial and not properly identified and not shown to be an original writing, was received in evidence and marked "Plaintiff's Exhibit No. 10". Witness testified that he had a statement of the Simpson Lumber Company of the number of logs delivered which, as near as he could judge, was correct, and that it amounted

(Testimony of E. W. Bernitt)

to about 4000 logs that went through the boom in 1908 before he started in to work again, that is between December 23rd and January 5th, and that there would be about 900 feet to a 1000 feet to the log; that they caught 4688 logs, being 4,045,273 feet that were delivered to the Simpson Lumber Company and that Clarence Gould had in the neighborhood of 1,900,000 feet, and there were some logs of the Smith-Powers Company.

On cross examination the witness testified that he never had anything to do with keeping the boom account but had looked at the books lots of times; that when Mr. Merchant first approached him on the subject he said that he had bought some land for the boom from McIntosh and told witness about the year 1882, '83 or '84 that he had a twenty-five year lease on the Holland land; that the raftsmen took all the money for rafting and one-half the money for the boomage; that Dean & Company bought all the supplies and kept an account of them and credited that account with twenty-five cents per thousand on all their own logs that went through the boom; that the years the boomage was not enough to pay for its maintenance they all paid their proportion of the deficit; that several years the boom was behind and at one time the witness had told Mr. Merchant that he felt like dropping it, but Mr. Merchant then stated that there would come a time when it would be a paying proposition again.

Witness further stated that Dean & Company

(Testimony of E. W. Bernitt)

looked after collecting its 12½ cents on the logs to the other mills and the raftsmen collected their 12½ cents from the other mills; that the witness could not say what they contributed when the boom was behind, but that each year it must have been four or five hundred dollars on each party, they having had a big freshet and everything was torn away; that all the boom and piling went out and they had to rebuild it; that these sums were not paid in cash but were just charged to their account with Dean & Company because they had an account there and had money coming, and that every year they had to renew chains and set some piling, and every year they had to re-build and extend the boom and did a certain amount of work, and that every year they had to have a pile driver there to repair it; that all the work and material was charged to the boom account including the raftsmen's time, and that there was never a year that they didn't take up there from fifteen hundred pounds to a ton of chain, as a chain would last over there not over five, six or seven years, but that the piles would last forever, that he had not seen a pile that gave out since they built the boom; that he had not seen a half a dozen piles that the tops of them were rotted down below high-water line, and that they pulled them out; that since 1890 witness thought there had been years when the boom didn't pay; that he had seen times when they didn't get half a dozen rafts during the whole season.

(Testimony of E. W. Bernitt)

Witness further testified that between Young and Wulff and Klahn and himself they were doing practically all of the rafting to the Marshfield mills, but others were rafting for other mills on the Bay; that in all his testimony, he was speaking of the old booms as they were before Mr. Powers changed them; that the extention to the Lower Boom holds more than the old boom did; that there have been extentions, storage booms and rafting pockets added, but the boom proper in the channel is not one-tenth part as big as the original boom in the channel, and the extentions are all on the mud flat which cannot be used much; that the Lower Boom consisted of four dolphins or piers at the upper end,—groups of piling with frame work around them,—with two sheer booms, one stationary and the other so that it could be turned across the channel, and at the lower end of the boom were three dolphins, while between them set at about high water mark on each side of the channel were boom sticks stretched along with piling on each side in pairs; that when they first built the boom Mr. Merchant's idea had to be carried out and they built a pocket over on the mud flat, but after the first year they found they could not use it so the next year they built side-booms and cut that piece on the mud flat out, but the flat was getting higher all the time and after a number of years they had to drive piling along the edge of the channel and cut all that part out; that this construction was quite an expense but that they abandoned it.

(Testimony of E. W. Bernitt)

Witness further testified that they never got a Government permit for any of the booms, that Mr. Merchant told them it wasn't necessary; that the logs came down on freshets but that he had seen them come down seven or eight times in a year; that if the men follow the logs right up it doesn't take over three or four days to catch them, but that he had seen it take a week or more, and in the average season there would be about four drives.

Witness further stated that they most always used the Lower Boom to catch the bulk of the logs and would then open the Upper Boom, drive in all of the logs between the two booms and go to work making up rafts, and raft, as the Upper Boom didn't need any attention except putting up the lights at night and the opening of the sheer-boom across the river to let boats through; that the plaintiffs had their scows with house boats on them which they occupied while at work and in which they took their meals; that these were the same scows that were used for rafting around the Bay and would not be at the boom continuously, but would be back and forth; that from the time the boom opened up in the fall until they finished in the Spring one or the other of the plaintiffs would be there while the other would probably be away, and there would be times when both would be away, but that the plaintiff Wittick kept an extra scow there and there might be an extra man living in that as the scows were fitted for two men each; that all the lines, booms and gear used for

(Testimony of E. W. Bernitt)

making up and towing rafts belonged to the raftsmen and was no part of the boom or of the boom account.

Witness further stated that his first conversation with Mr. Powers about the boom was in the latter part of the summer of 1907; that he remembered positively that he and Mr. Powers had several conversations about the boom; that the boom was divided in 1908 and they had several conversations about it before that time, that is about how the channel was to be split; that witness was introduced to Powers on the Dean wharf by Mr. Squires and at that time they did not talk about the boom; that at that time of year there was nothing doing at the boom, no rafting, no logs in the boom and no one over there; that before witness and Mr. Powers went over to the boom Mr. Powers had several men over there surveying the boom and witness saw them there surveying; that when Mr. Powers and witness went over there the latter had said "Let's go over there and take a look at that thing over there"; that they looked around where the middle dolphin was situated and their desire was to make the boom as wide as possible, but Mr. Powers said the Government would not stand for it; that nothing was said at that time about the ownership of the boom and witness had no further conversation with Mr. Powers about the boom until he got the first raft of logs out in the fall; then witness asked Mr. Powers what he meant by catching and rafting logs and not letting

(Testimony of E. W. Bernitt)

plaintiffs know about it, or something to that effect, because witness thought plaintiffs had a right to be over there and raft the logs; that Mr. Powers said "You better get Mr. Wittick and come up to the office and we will talk it over", and within a few days, possibly the same day, the plaintiffs went over to the office and Mr. Powers told them after they had talked for a while that the plaintiffs had no right over on the boom; that the first talk witness had with Mr. Mereen was on the wharf but that he did not think that Mr. Powers was there, but was not sure; that at that time Mr. Mereen stated that he understood that the witness and another party in North Bend claimed an interest in the boom, and witness then told him that they did claim such an interest, whereupon Mr. Mereen said that was no way to have it, that they had to have the whole thing or none; that this talk was in the summer of 1907 one Sunday morning, and the next talk witness had with Mr. Mereen was in the fall when he wanted some ninety foot boom sticks to repair the upper sheer boom at the Lower Boom, at which time Mr. Mereen said such sticks could not be had; that the conversation the witness had with Mr. Powers about the Devers suit was in the Spring of 1908, and at that time witness told Mr. Brown to charge plaintiffs fifty dollars apiece for the settlement, which charge was accordingly made.

Witness further testified that during the winter of 1908, i. e. the boom season of 1907 and 1908,—

(Testimony of E. W. Bernitt)

the plaintiffs handled all the logs at the boom and collected the boomage and rafting charges the same as they had done before; that the company took twenty-five cents per thousand on the logs going to the Smith mill, about one million feet, and credited it to the boom account, witness supposed; that he received a statement of the rafting but none of the boom account, and asked Mr. Brown how the boom account stood and was informed that it was about forty dollars ahead but that some bills were to come in yet and it would be just about even; that Mr. Powers didn't say anything about how the boom should be run for the year 1907 and 1908; that he might have told plaintiffs to go ahead and handle the boom just the same as they had been used to handling it, but witness did not remember; that when Mr. Powers said plaintiffs had no interest in the boom no arrangement was made about their doing any further work on the boom; that witness did not see Mr. Powers until the next day when he (Bernitt) came down the river after Mr. Gould had spoken to Mr. Powers and he had told him that plaintiffs should raft the logs, and he then asked witness to deliver rafts the next day, and witness then told him that he did not think it could be done, that there were some logs for North Bend that had to come out first, but that plaintiffs would do the best they could; that they went to work on the boom January 5th, the witness having two men besides himself, i. e. Mr. Cully and his son, and plaintiff Wittick had four men there for a while and then once in a while

(Testimony of E. W. Bernitt)

he would take two men off to go to Daniel's Creek to get a raft; that as a general thing plaintiffs had five men and whenever there were no rafts to tow they would help at the booms; that witness was doing most of the towing to the Smith mill because the boats Mr. Powers had there did not seem to get around; that they broke down a good deal and whenever there was a raft ready to go it didn't make any difference which mill it went to, plaintiffs generally hooked on to it and took it there; that witness never got a cent for working on the boom or for rafting or towing that year; that he received a check for \$600.00 from the Simpson Lumber Company in February, but he had a credit there from the year before of \$304.00, but after they refused to pay that money to Mr. Powers or to plaintiffs the witness considered himself indebted to the Simpson Lumber Company for \$300.00, until the Court decided who should have the money; that Mr. Powers never said a word about paying plaintiffs for their work, only that Mr. Brown asked witness to bring in his bill at the time he went over there and demanded a statement, saying, "Why don't you bring in your bill for the work?" To which witness replied that he could not until he had a statement or the scale of the logs, at which Mr. Brown just smiled; that witness had no record of the material furnished or put into the boom for the year 1906 or 1905; that in the season of 1908 and 1909 they started on January fifth and attended to the boom to the 10th or 11th, and then started to tow rafts; that from the 14th

(Testimony of E. W. Bernitt)

to the 18th of January there was a freshet and they attended the booms and on the 18th they attended the boom again, and again on the 21st and 23rd, and then started to tow rafts again.

The witness stated that he had the number of men that they worked and the number of men that Mr. Powers worked and a statement of the work done. Witness testified as follows:

“I have got the number of men that we had working and the number of men that Mr. Powers worked. It says on January 13th, Smith-Powers had five men on the boom; on the 14th, four men; on the 15th and 16th, no work done,—the same men were there but they didn’t do anything—I think it was blowing so hard then that we couldn’t do anything. Of course that was previous to the freshet, and we always had bad weather then. Then on the 19th and 20th, towed rafts; on the 19th raft to Porter; on the 20th I towed a raft to Porter.

Q. Porter is one of the Simpson Lumber Company’s mills at North Bend, is it not?

A. Yes. Well, then we skipped the 21st, again we were attending the boom. On the 24th, towed sticks for the boom and a raft back to Smith mill. On the 25th, raft to the mill and back to the boom, and the same day towed a raft across to the Oil Warehouse, and on the 26th must have towed that same raft to the mill from the Oil Warehouse, and sticks back to the boom. On the 27th, towed raft across, but landed at Plat “B”, for Smith Company. On

(Testimony of E. W. Bernitt)

the 28th, to the Boom, made drive too for Simpson. 29th, took raft to Porter and turned into the boom—had to stay there to see it scaled and put in. On the 30th, took raft to Stave Mill.

Q. That would be a Simpson raft, would it not?

A. Smith Company. You see when we got across we couldn't always make it on a tide from the Boom to the mill, so we aimed to get across to this side into deep water and then on the next flood go up to the mill. On the 31st, took a raft to Smith mill. The first, worked at boom and took raft to Porter. 2nd, raft to Smith mill. 3rd, raft to Smith mill. 4th raft to Smith mill and worked at booms stowing North Bend raft. 5th, turned in raft at Porter, and towed sticks back to Boom. I have a lot of stuff here but don't suppose you want it—what Mr. Powers boats were doing, etc. If you want to know what the rest of the boats were doing I can give it to you.

Q. Go ahead with what you did.

A. Well on the 6th and 7th we worked at the Boom.

Q. What month?

A. February. On the 8th towed raft to the Oil Warehouse. On the 9th I towed it to the mill and went back to the Boom. On the 10th raft to Plat "B" for Smith. On the 11th, raft to Smith mill. On the 12th, we started—that was the end of that boom. On the 12th we started to work on the Upper Boom, to the 17th, rafting and separating

(Testimony of E. W. Bernitt)

all the Smith-Powers logs, and separating logs which he had stored there and got mixed up with the Coos River logs,—They stowed their South Slough logs there and they got mixed up, so we had to separate them, they were all together with the logs that were for North Bend”.

Upon re-direct examination witness was shown a paper purporting to be a statement of his account with Dean & Company dated January 14th, 1906, and which he identified as having received on that date in the office of Dean Lumber Company which, over objection of the defendant that it was incompetent, irrelevant and immaterial, was received in evidence and marked “Plaintiff’s Exhibit No. 11”

PLAINTIFFS’ EXHIBIT NO. 11.

Marshfield, Ore. Jan. 14, 1906

W. BERNITT

In Account With

DEAN LUMBER COMPANY (Inc).

Successors to E. B. Dean & Co.

Manufacturers Wholesale and
of & Dealers in Lumber of all kinds Retail Dealers in
Shingles, Mouldings, Lath, Sash, Doors, Lime, Brick,
Cement and Fruit Boxes. A complete stock of Gro-
ceries, Provisions, Boots and Shoes, Dry Goods,
Clothing, Hardware and General Merchandise. Hay,
Grain and Feed.

(Testimony of E. W. Bernitt)

Dec 31 To Mdse	22 60		
C. River Boom $\frac{1}{4}$	40 82	63 42	
	<hr/>		
Credit			
Dec 1 By Bal	462 81		
Bill	5 50		
148 Logs 89,747 Masters	31 42		
Schr Ivy	2 50		
Mdse Credit	45	502 68	
	<hr/>		
Credit Bal due		439 26	

Witness then testified that the second item was for one quarter of what the boom was behind for that year after the account was balanced and charged up; that witness had asked Mr. Squires if he knew what became of Dean & Company's old books and told him if he had the books he could prove their claim to the booms, and Mr Squire had told him that the books were shipped to California and experted and destroyed; that the witness only met Mr. Dillman once and that was at the booms when he saw a Mr. Sullivan's launch coming over to the boom, and going down to the scow found Mr. Merchant and a stranger standing there; and Mr. Merchant then said to Mr. Dillman, "Let me introduce you to your partner, Mr. Bernitt"; that witness had heard that Mr. Dillman was the man who had bought out E. B. Dean & Company.

Witness further testified that the plaintiffs' gear consisted of boom sticks, lines, anchors, ropes, gaso-

(Testimony of E. W. Bernitt)

line launch and engines and gasoline rafting scow and chains; that the scow was used for towing in the rafts and for moving the sheer booms; that they received the scale of the rafts from the mill and once a month or two months they would go to the mill office and get a statement of the number of rafts and what each raft scaled and that the plaintiffs took their pay on the scale that the logger accepted at the mill, which is the general custom on Coos Bay.

Witness further testified that the new boom he spoke of opposite the Creamery is an addition to the Old Boom; that the Old Boom is all there with the exception of the Upper end that Powers pulled out to widen the boom to make the extention, perhaps fifteen or twenty piles, and that Mr. Powers had a lot of piles pulled out right at the head of the Old Boom where there was a whole bunch of them, because the sheer-boom hung on to them and that below that there were three piles side by side and farther down only two side by side, and the piles were spaced fourteen to sixteen feet apart up and down the channel and that they were pulled out by Mr. Powers for a distance of eighty or one hundred feet; that witness always had it in his head that the cost of the Upper Boom was in the neighborhood of \$3000.00; that the Lower Boom was three or four different years in building and witness thought it cost a couple of thousand dollars the first year and that the cost the second year would have been twenty five hundred dollars more, amounting to \$4500.00

(Testimony of Victor Wittick)

for the two years; that they then skipped a year but they started in again, but had trouble with Mr. Holland who owned a piece of land and prevented them from driving piles in front of it, and that witness considered the boom ought to be worth what it cost them, that is not as an investment but as an actual cost of probably ten, eleven or twelve thousand dollars; that next to the last year they operated them the boomage earned from the Simpson Lumber Company was \$600.00 or \$650.00 for plaintiffs' half, the earnings of the booms being about \$1250.00, not counting the boomage to the Smith mill company which was spent in repairing the boom amounting to the sum of \$300.00; and that the plaintiffs did no repair work or construction work on the boom after the conversation with Mr. Powers at which he told them they had no interest in the boom, but the defendants repaired it thereafter.

Upon re-cross examination the witness testified that no lines were charged to the plaintiffs; that they had to have a new coil of five inch line each year, that he supposed it was charged to the boom and a coil would weight six or seven hundred pounds, and would cost from ten to twenty-two cents per pound.

Whereupon the plaintiff, Victor Wittick, was called as a witness in behalf of plaintiffs, and upon direct examination testified in substance as follows:

That he was forty years old, had lived on Coos Bay twenty one or twenty-two years and knew where

(Testimony of Victor Wittick)

the booms in question were; that he claimed a quarter interest in these booms, which interest he had acquired in about the year 1900, buying it from Emmett Anderson or John Anderson Emmett, as he is sometimes known; that witness and Matt Klockars bought a one-fourth interest from John Anderson Emmett, or John Anderson as he was sometimes called, and the year afterwards witness bought out Klockars; that John Anderson Emmett gave them a bill of sale, and Klockars gave witness a bill of sale and two papers were then identified by the witness as being said bills of sale, and over the objection of defendant that they were incompetent, irrelevant and immaterial, were received in evidence and marked for identification "Plaintiff's Exhibit No. 12" and "Plaintiff's Exhibit No. 13" respectively.

PLAINTIFFS' EXHIBIT No. 12.

KNOW ALL MEN BY THESE PRESENTS, That in consideration of Three Thousand Dollars, the receipt whereof is hereby acknowledged, I, John Anderson of the first part, do hereby grant, bargain, sell, transfer and deliver unto Victor Wittick and Matt Klokars, parties of the second part, their heirs, executors, administrators and assigns, the following described personal property, to-wit:

140 Boomsticks, more or less, about one half of said sticks marked with cross, thus "X" and about one half of same being marked thus "W", together with all chains, chocks, etc. belonging to said sticks,

(Testimony of Victor Wittick)

Also Six Boats, 3 Scows, One Boathouse, Sixteen Anchors & Lines more or less, and all pike poles and all other articles used in connection with the rafting gear now operated on the waters of Coos Bay and Tributaries, by John Anderson, Also the one fourth interest in the Booms at Mouth of Coos River, and generally known as the Coos River Booms, in Coos County Oregon,

Also in further consideration of the money paid by the said parties of the second part herein, in addition to the articles sold as above enumerated the said John Anderson, agrees to quit the rafting business on the waters of Coos Bay and Tributaries, and not to engage in said business for a period of two years from date hereof, except by the written consent of the parties of the second part hereto.

TO HAVE AND TO HOLD the same unto the said parties of the second part their executors, administrators and assigns forever.

And I, the said Grantor, do hereby covenant and agree to and with the said Grantee that I am the owner of said above described personal property; that the same is free from all encumbrances and that I have a good right to sell the same, and that I, my heirs, executors, administrators and assigns shall warrant and defend the same against the lawful claims and demands of all persons whomsoever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 31 day of March, A. D. 1900.

[Seal]

JOHN ANDERSON

(Testimony of Victor Wittick)

Signed, sealed and delivered in the presence of

JAMES T. HALL

JOHN F. HALL

PLAINTIFFS' EXHIBIT No. 13.

KNOW ALL MEN BY THESE PRESENTS,
That Matt Klockers of Coos County State of Oregon,
the party of the first part, for and in consideration
of the sum of Fifty (\$50.00) Dollars, Gold Coin of
the United States of America, to him in hand paid
by Victor Wittick of Coos County, Oregon, the party
of the second part, the receipt whereof is hereby
acknowledged, does by these presents grant, bargain,
sell and convey unto the said party of the second
part, his executors, administrators and assigns, all
my right title and interest in and to the personal
property described as follows, to-wit: 140 boom
sticks, more or less, about one half of said sticks being
marked with a cross, thus, "X" and about one half
of same being marked thus "W" together with all
chains, chocks etc. belonging to said sticks, Also
Six Boats, 3 Scows, One Boat house, Sixteen Anchors,
& lines more or less, and all pike poles, and all other
articles used in connection with the rafting gear now
operated on the waters of Coos Bay and tributaries by
the parties hereto, also, all my interest in the booms
at the mouth of Coos River, and generally known
as the Coos river Booms, in Coos County, Oregon.

Also in further consideration of the money paid

(Testimony of Victor Wittick)

to me by the said party of the second part, herein, in addition to the articles as above enumerated the said Matt Klokers, agrees to quit the rafting business on the waters of Coos Bay and Tributaries, and not to engage in said business for a period of two years from date hereof, except by the written consent of the party of the second part hereto,

TO HAVE AND TO HOLD the same to the said party of the second part, his executors, administrators and assigns forever. And I do, for myself my heirs, executors and administrators, covenant and agree, to and with the said party of the second part, his executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever, lawfully claiming or to claim the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 26 ' ' day of January, in the year of our Lord, 1901.

|Seal|

MATT KLOCKERS

Signed, sealed and delivered in the presence of us as witnesses:

JOHN F. HALL

JAMES T. HALL

(Testimony of Victor Wittick)

Witness then testified that the booms described in those bills of sale were the booms in controversy; that he and Klockars had paid \$3000.00 for the interest in the boom including the rafting gear and that he paid Klockars \$300.00 when he bought him out besides assuming the indebtedness against them amounting to the sum of \$2500.00 which witness afterwards paid; that the boomage charged while he was there was twenty-five cents a thousand and the rafting thirty-five cents per thousand, of which boomage charge plaintiffs received half and half went to Merchant or the Dean Lumber Company; that when witness bought in the other half belonged to Dean Lumber Company or Dean & Company, he did not know which; that he always called it Dean & Company; that in North Bend plaintiffs collected one-half the boomage and Dean & Company the other half, but on the logs that went to Dean & Company the boomage went to the boom account; that the company kept it and witness guessed they paid it out for piles, etc., that he got no statement from them and didn't know anything about how the boom stood; that he asked the plaintiff Bernitt and took his statement for it, never getting a separate statement, but that he went and asked what was coming and took what they gave him and thought it was all right; that he accepted the mill scale which is the custom among rafters; and that witness never had any conversation with Mr. Powers.

Upon cross examination witness testified that he never had any conversations or dealings with Mr.

(Testimony of Victor Wittick)

Powers or anyone representing the Smith-Powers Company; that he never knew Mr. Powers even after he had been here a year; that he was in the mill office with Mr. Bernitt at the time Mr. Powers told them that they had no interest in the boom, but he didn't remember how long ago it was.

That when plaintiff and Klockars bought out Emmett Anderson they did not make any deal or agreement with the Dean Lumber Company nor ask them about it, and never did have any written agreement with them; that witness notified the book-keeper that he had bought Anderson out—bought his rafting out-fit and that when he bought out Anderson he could not tell what the rafting out-fit was worth, but that the boom was worth the most; that the boom sticks were worth a whole lot, some were new and some were old, but all were useful; that new boom-sticks were worth eight or ten cents a foot, and that the cross-sticks are 52 feet long and the side sticks run from 70 to 95 feet long; that there were ten sets of sticks purchased by him that had chains and some extra or spare sticks; that these sticks were worth \$5.00 apiece, but the boats when new were worth \$100.00 apiece, but that these were not new and that witness sold two of the poorer ones for \$30.00 each, but the boats ought to be worth \$50.00 apiece on an average; that there were three scows in the outfit purchased by him and that two of them witness could not buy for less than \$150.00 apiece, but that one of the scows wasn't worth any-

(Testimony of Victor Wittick)

thing and he gave it away; that he guessed the boat house was worth about \$150.00 or \$200.00 as it cost \$350.00 or \$400.00 to build them new; that witness did not know what the anchors were worth, but that what anchors he bought new he paid \$32.00 apiece for; that six of the anchors he got from Anderson Emmett ought to be worth from fifteen to twenty dollars apiece, and the rest of them were not good but could be fixed.

That the bill of sale says "sixteen anchors and lines, more or less", but that witness did not remember how many lines there were, that the out-fit was a complete one and the job could not be handled with less than three coils of rope and that in about the year 1900 rope was worth twenty cents a pound; that the witness had to pay about seventy-five or eighty cents a coil for the rope but that it is not so high now; that there was a lot of other stuff, pike poles, pieves, saws, axes, dogs, etc., and that witness did not know what it would be worth; that the stove, cooking utensils, etc., came with the scow and would be worth eighteen or twenty dollars, the pike poles ten or twelve dollars, the boom chains five dollars apiece; that there are fourteen chains to a set and there were ten sets that witness used with pretty fair chains on, but the way the others were the witness would not give more than \$3.00 or \$2.50 for them; that ten sets at \$3.00 per chain would make a little more than \$420.00 for them, and that would have been plenty for them; that part of the consid-

(Testimony of Victor Wittick)

eration for the agreement was that Anderson was to stay out of the logging business for two years; that there was no such agreement, only Anderson put that in the contract himself; that the witness did the bargaining for himself and Klockars, and when he bought out Klockars, Klockars had said "You give me fifty dollars now and you can have the whole rafting business and everything and I get out of it"; that witness did not consult with Dean & Company when he bought out Klockars nor was anything said to them about it, but a while afterwards he spoke to the fellow in the office about it.

That at the time Powers had told witness in the office that he did not recognize plaintiffs as having any interest in the boom is the only conversation witness ever had with Mr. Powers, and that then he "just listened". Witness testified that afterwards he went over on the boom with Mr. Bernitt and were catching logs but had no agreement or understanding with Mr. Powers or the Smith Powers Logging Company and didn't keep track of the number of days he worked or the amount he paid the men; that he paid his men so much a month and when they didn't work there they worked somewhere else, and witness kept no record of how much they worked catching logs; that he had three men besides himself in January and February, he thought; that he helped make up more than one raft,—he thought more than three, and that he towed all the rafts that he had in his gear; that he didn't remember towing

(Testimony of Victor Wittick)

any in Smith-Powers sticks and that when he wasn't towing he was there and worked, as he never stood and looked on; that sometimes witness helped sort logs, but couldn't tell how much time he spent that way, that he guessed he spent half a day; that he never got anything for his work there or for his towing, and the only statement that he got from the Simpson Lumber Company was for the number of logs he towed.

Upon re-direct examination the witness testified that in his testimony about the value of the stuff he bought from Anderson he fixed the price to be the value at that time; that he didn't figure on boom sticks at all, that it was the Coos River Boom he wanted, he didn't care much about the rafting gear; that he bought four boom sticks a couple of years afterwards which he thought were ninety or ninety-two feet long for \$48.00; that the rope was three inch rope, witness thought; that he bought three inch rope mostly for a year or so when it was so high; that the rope he got from Anderson Emmett was all mixed up, all kinds, mostly old and had been used mostly all winter; that the chains were some of them poor and some of them good; that there were two chains one year old and they were the newest of the whole outfit.

Witness further testified that in January and February of 1909 he was not on the boom very much but that his crew was there most of the time that

(Testimony of Victor Wittick)

he was away; that at the time he went there some of "Powers' men" were standing there on the sheer boom but that witness didn't know "if they were working or not"; that they were not there all the time and the witness wasn't there every time, but that when he went there he saw them standing on the boom and saw them in a boat and they went across the river and laid in the brush and built a fire, and it was rough and rainy; that witness' men were catching some logs; that he couldn't say whether they were working or only watching out for logs; that witness was rafting logs for Simpson from Daniel's Creek and was paid for them but not for those particular logs from the Coos River Boom; that the sticks he got from Emmett Anderson might be called all useful, and what he could not use for rafting logs he used for sheer booms to put in front of creeks and small sloughs to keep the logs from running in, in which manner he used something like four sets, fourteen sticks in a set, which were probably worth about four cents a foot, that he would have sold them for little or nothing if he had a chance to sell them then.

Witness further stated that he would have paid seven or eight hundred dollars at most just to get the rafting outfit, although it would have been worth more if new.

On re-cross examination the witness stated that the way they worked the boom the fellows that had the interest in the boom got the rafting, and the

(Testimony of John Anderson Emmett)

principal thing he wanted to get was the rafting; that most of the rafting on the Bay at that time was from the boom but that he had a whole lot of rafting from Daniel's Creek too; that he then had left two sets of the chains that he got from Anderson Emmett but the others were destroyed and these chains he merely used to hold sticks together; that he didn't do much of the repair work on the boom and that plaintiff Bernitt used to go and take a man with him to do that work.

Whereupon John Anderson Emmett was produced on behalf of the plaintiffs and after being first duly sworn testified in substance as follows:

That he was fifty-six years old and lived at North Bend and sometimes transacted business under the name of John Anderson.

Witness was then shown Plaintiff's Exhibit No. 12 and testified that he signed it; that he acquired an interest in the boom in 1895 and sold it to Victor Wittick. In answer to the question, how much of an interest he acquired in 1895 he said, "Well, wasn't it one-fourth what I had"?

Witness then testified that he bought first from Alex Tast and then from Hillstrom, that he got a half interest from Tast and Hillstrom, or a one-third interest. In answer to the question "What do you mean by a half of the boom", witness answered, "Well, I mean when I—wasn't it one-fourth what I had interest in that boom". Witness then testified

(Testimony of John Anderson Emmett)

that Bernitt and he and Merchant owned the boom but that it was so long since that he forgot how they had the boom and forgot how much E. B. Dean & Company had; that he didn't know if they had an interest; that he didn't know how much of an interest Bernitt had; that the witness got a one fourth interest from Hillstrom and Tast and paid them \$800.00 each; that one of them owed the witness, times were hard and the gear wasn't worth anything but that he went in and asked Merchant about it and Merchant told him that maybe times would pick up and it might pay him to have the interest in the boom; Merchant said there was money in it when times picked up and that this was in 1895, witness thought. Witness further testified that the gear was no good, the boom sticks were all rotten, the chains were no good and nothing was good that they had; that it was in 1894 he purchased from Tast and 1896 from Hillstrom, and that Hillstrom knew more about it than he did.

The witness then testified as follows:

"Q. How long did you hold that, what did you do with it, did you sell out?

A. Sold out to Victor Wittick.

Q. Any body else?

A. No.

Q. That bill of sale that I showed you a few minutes ago was to Matt Klockars and Victor Wittick.

A. Yes, Matt Klockars too.

Q. Do you remember what year that was?

(Testimony of John Anderson Emmett)

A. Wasn't it 1898, or what was it—It says on the bill of sale—I forgot it, I never put that on my mind at all after I sold it and signed it.”

Witness was then shown the bill of sale and after looking at the same stated that it said 1900 and that must have been the time; that the bill of sale expressed the correct time.

Witness then stated that the plaintiff Wittick would not buy unless the witness would quit rafting all together and that was the bargain, but that he did not know whether the bill of sale said anything about it or not; that he forgot how the earnings were divided but that they made money; that he didn't remember, only that when he rafted he went to Merchant's store and that Mr. Merchant paid him for the rafting and boomage and that he took what was coming to him and went away; that witness' books were all thrown away and he couldn't find any of them; that Tast and Hillstrom gave him some writings when he bought, which writings he thought he left in Bennett's bank or office, but that they could not find it when he had asked for it.

Upon cross-examination the witness further testified that he never had any deed or writing from Merchant and didn't see Merchant or the Dean Lumber Company or anyone else when he sold to Wittick; that he sold out for \$3000.00 including all that he had bought and all his gear in old North Bend; that there were lots of boats in there, “but they wasn't

(Testimony of C. J. Hillstrom)

worth nothing", only the boom that he figured; that there was lots that were good but that he had a few new sticks, how many he didn't know; that he had some rafting boats but no gasoline boat, and he had one new boat that he bought after he had bought out Tast and Hillstrom; that he had three scows but all of them were rotten and they are not using them any more; that one of them is up on Simpson's point with some fishermen living in it; that he never bought any anchors and that he had rafting gear before he bought out Tast and Hillstrom, and all was included in the sale to Wittick; that at the time of the sale there were no logs in the booms but there was some rafting in sight for the boom and that that was where the money was; witness further testified that he had not talked with Bernitt of Mr. Wittick about this and upon being shown his affidavit made in this case on October 14th, 1910, acknowledged his signature and explained that he hadn't thought the question meant outside of the rafting, or something of that kind.

Whereupon C. J. Hillstrom was called as a witness on behalf of the plaintiffs and after being first duly sworn testified in substance as follows:

That he was forty-three years old, resided at Marshfield and knew the boom in question; that he used to know it when he had an interest in it; that it is situated in the North Bend channel of Coos River,—the inside channel that runs through the mud flat,

(Testimony of C. J. Hillstrom)

and that part of the boom was on the mud flat and part of in the channel; that C. H. Merchant who was a partner with Dean and Wilcox owned a half interest in the booms; that the witness owned a one-eighth interest which he bought from Bob Kruger, and Alfred Haglund owned a one-eighth interest, the witness and Haglund being partners in the gear; that he bought in 1890, paying \$1600.00 for the interest in the boom and for the boats, scows and rafting gear; that this included a half interest in the rafting gear and a one-eighth interest in the boom; that when he bought, so far as he could remember, there was some kind of a writing in J. W. Bennett's office and that Mr. Bennett at the time asked him if he understood what he was buying and asked Bob Kruger if he had explained to witness that the Dean Lumber Company would not give any deed to this interest in the boom, and that Kruger answered: "Yes I explained that"; that the witness understood also that he bought it on the same grounds that the parties before him had held it; that if it was satisfactory to them it would be all that he asked for, just the way they had it before; that they operated the booms together, but the rafters charged for the rafting and twenty-five cents for catching the logs; that the rafters collected their part of the boomage at the other mills and that the Dean & Company mill kept the books for the boom and after all the expenses were paid they used to receive the balance that was left; that some times it didn't leave anything and some times it left something; that witness thought there

(Testimony of C. J. Hillstrom)

were some times it stood behind; that witness could not remember that they had ever paid anything and it would be a very trivial sum that it was behind, but that generally the boomage used to pay for the fixing of the boom; witness further stated that he thought the company used to give them statements every time they asked for it; that the company used to tell him how the boom account was standing, but that he was unable to remember how it stood although there were lots of logs running through the boom; that so far as he remembered he had never had hold of the paper Bob Kruger gave him, that it was left in J. W. Bennett's office and that when witness sold he thought they used the same paper, turned it over; that J. W. Bennett was witness' attorney then, but that since then he had got all his papers from him and this paper was not among them and he didn't have it in his possession; that he held the interest in the boom for about five years and then sold to Anderson Emmett, selling him a half interest in the rafting gear, scows, boats, boom-sticks, anchors and interest he had in the Coos River Boom.

Upon cross examination witness testified that he didn't explain to Anderson Emmett at the time he bought that Dean & Company would not give a deed or paper of any kind to the property, because Emmett was the man witness was working for and knew more about it than witness did, so he stated; that the rafting gear, etc., was worth something; that some of it was in fair shape and repair, but lots of it wasn't of much

(Testimony of C. J. Hillstrom)

account, because "gear that been running for long time in salt water soon runs out"; that the first month after he bought in witness was repairing the boats which couldn't be used without repairing; that one scow was pretty new, that about eight sets of boom sticks were water logged, water soaked, and the chains pretty well worn; that the witness and Haglund, his partner, collected their part of the boomage from the mills other than the Dean mill; that they collected their one-fourth separately, and witness supposed Dean & Company collected their one-half; that they collected boomage just from the other mills, and the boomage on the logs that went to Dean & Company's mill was no sufficient to pay for repairing and maintaining the boom; that witness thought at the time he really did own an interest in the boom and didn't know that owning an interest in the boom had anything to do with the rafting; that they made a lot more money out of the rafting than out of the boomage and that the others interested did the work of keeping up the boom but he didn't think they turned in their time to Dean & Company or counted their time spent in repairing the same.

Upon re-direct examination witness testified that they did not get paid for the time they put in on repair work, not directly but by having the privilege of catching the logs and rafting them; that the mill didn't have any other raftsmen to take logs from the boom and that therefore they considered the exclusive right to handle Dean & Company's logs as value enough for the time they put in, and that he sold out in 1895.

(Testimony of Alfred Haglund)

Alfred Haglund was then called as a witness on behalf of the palintiff and after being first duly sworn testified in substance as follows:

That he was fifty-one years old and had lived in Marshfield since 1882; that he was acquainted with the plaintiffs and knew the booms, the Upper Boom was there before he came to the Bay, and that they built the Lower Boom after he came; that he thought it was in January, 1889, that he and Mattson bought a one-fourth interest in the boom from George Wulff; that Judge Hall drew the bill of sale and that when they had the bargain made they went to C. H. Merchant and asked him if he had any objection and he said that he had no objection if they would attend to the business together with Mr. Bernitt in the boom; that the witness and his partner paid Wulff \$2400.00 and operated the boom in the neighborhood of five years; that witness then sold out to Alex Tast, his partner Mattson having in the meantime sold out to Bob Kruger; that Merchant had a half interest and the witness and Mattson and Bernitt the other half, Merchant representing Dean & Company; that Dean & Company kept the books but that witness never got a statement and never went through the books; that Bernitt usually looked after the business; that they left Dean & Company's boomage for the repair of the boom for the next year; that while witness claimed this ownership most of the logs that went through the boom went to the California Lumber Company, now called the Porter mill, some went

(Testimony of Alfred Haglund)

to North Bend and some to Dean & Company; that twenty-five cents was charged for catching the logs, and witness and his partner drew their share, $6\frac{1}{4}$ cents, for those that went to North Bend and to Porter Mill, and so far as witness knew Bernitt got his $6\frac{1}{4}$ cents and Dean & Company $12\frac{1}{2}$ cents; that 35 cents was charged in addition for the rafting, Bernitt and his men and the witness divided it, Bernitt getting half and Mattson and the witness a fourth each; that the boom was repaired in the spring, some times as soon as they got through with the logs, or else in the fall before the freshet, and Bernitt usually looked after that and would tell the others how the boom stood; that Dean & Company didn't render statements and while witness was interested Dean & Company paid them for their rafting, and that the boomage on their logs just about paid all repairs.

Upon cross examination the witness testified that he bought from Wulff in January and that the boom was then full of logs and there was quite a profit in sight in that year's rafting and boomage, as it kept them busy rafting all that season. That the boom was not full but there were lots of logs in it that had been gathered and the money that was made on the boomage came to him and his partner, that Wulff and Bernitt had taken out some few; that nobody rafted away from the boom but Bernitt and witness and partners; that his object in buying out Wulff was to get the right to raft those logs and also the share of the boom, and the rafting was the big-

(Testimony of Alfred Haglund)

gest thing; that witness and his partners' share of the boomage was $6\frac{1}{4}$ cents and that his share of the rafting was $17\frac{1}{2}$ cents, so the biggest part of the profit was in the rafting, but it would be the biggest work too; that if they hadn't the interest in the boom they couldn't get the rafting; that Wulff had two old boats worth about forty dollars apiece and witness paid sixty-five dollars for a new boat; that he and his partner purchased three or four anchors, he thought, but didn't know what they were worth; that they had on big one made for which he thought they paid twenty-four dollars; that he didn't remember how many boom sticks they got, but thought it was six or seven sets, with twelve sticks to the set; that they were all kinds; that there was one new set of chains and the rest were pretty old, and sticks that were kind of swampy they put in the boom, that is old ones that could not be safely used for rafting and they never asked anything for them; that the rest of the sticks they used during the years witness was there and sold to the fellow he sold out to; that they renewed some of the chains; that they got one old scow from Wulff and had one built for which they paid \$160.00, both of which were included when they sold out; that they got all the lines there were from Wulff, both old and new, and that he never saw the boom account, but of course there must have been some kind of account kept; that he sold to Alex Tast but didn't say anything about the sale to Merchant or to Dean & Company; that he didn't do much repairing of the boom as Bernitt did that, that he had a

(Testimony of Alfred Haglund)

pile driver and bossed the job and that the kind of repairing witness did was to now and then replace a chain that he noticed was gone; that witness helped tend the boom and catch the logs whenever there was a freshet and that he never knew whether there was a permit for the boom from the Government, but heard it was leased for many years to run, and that he never claimed to own any land or any interest in the land, only the boom.

Upon re-direct examination the witness further testified that in the winter time logs came in the boom while during the summer there was rafting direct from the camps on tide water; that in the winter the booms were the main thing and there was no rafting from South Slough then or on Isthmus or Catching Slough only when there were piles for some one else; that they had a few rafts from Coal Bank Slough that didn't go through the boom and during the winter season or freshet season was the only time they got rafts from the boom, but during the balance of the year they rafted direct from the logging camps.

Upon re-cross examination the witness testified that he could not tell whether more logs came through the booms or direct from the Camps; that one season they were pretty busy on Coos River and that they received thirty-five cents for rafting from the river, and in some places forty cents; that it was easier to raft from the boom but that they had lots of drift

(Testimony of John Mattson)

to bother with while from the camps it was all clear logs, so that he was unable to state which was the better; that in those days they just drifted with the tide and had to drift a good deal farther from the camps than from the boom.

Upon re-direct examination witness testified that in making up rafts at the boom they had to separate the different logs for the different mills and at the logging camps they had nothing to do but put the sticks around them and drift down; that twenty-five cents boomage was just catching them and that the sorting belonged to the rafting.

John Mattson was then produced as a witness on behalf of the plaintiffs and after being duly sworn testified in substance as follows:

That he was fifty-six years of age and had lived in the vicinity of Coos Bay for thirty-four years; that he knew the booms in controversy and once owned an interest in them; that in 1890 he and Haglund had bought a one-fourth interest from Mr. Wulff and that he held the interest in them a year and a half and then sold to Bob Kruger; that if not mistaken he went to attorney John Hall, one of the attorneys in this case, at the time he sold out to have the papers drawn; that when they bought the witness and Haglund saw Mr. Merchant and Mr. Bernitt and found out whether it was satisfactory to them and they said it was so long as the purchasers did the work; that they rafted two seasons,—1890

(Testimony of John Mattson)

and the following season, and received thirty-five cents for rafting logs from the booms to the mills and thirty-five cents for boomage; that witness and Haglund receive one-fourth of the twenty-five cents boomage; that Mr. Bernitt was kind of head man on the boom and had to look after it, and looked over the books and everything; that the witness didn't look over the boom account and that Dean & Company never made any statement to him but that it was satisfactory; that the boomage for all the logs that went to Dean & Company's mill was credited to the boom account at their office and witness got some of it on his store account; that while witness was interested in the boom they took logs to North Bend, to Dean & Company's mill and to Porter, the owners of the different mills paying for the rafting; that as to the boomage it was so long ago that witness could not remember, but thought it was paid to Dean & Company and turned into the boom account.

Upon cross examination witness stated that there were a great many logs in the boom when he bought for which he received the boomage; that part of what they bought of Wulff was the logs in the boom and the privilege of rafting them and they made a good deal of money out of the rafting and boomage; that he didn't remember how much they made and didn't believe it was much as they paid Wulff, but that it was a pretty good paying business; that he was no

(Testimony of L. J. Simpson)

book-keeper and trusted to Bernitt to look after the accounts.

That thereupon the plaintiffs offered in evidence an instrument purporting to be a bill of sale from Alfred Haglund to Alex Tast, and defendant admitted that Haglund if present would identify the signature thereto as his own and that the bill of sale was executed by him to Tast at the time he sold out to him, and that the record might appear as though Haglund were present and did so testify, but objected to the instrument as incompetent, irrelevant, and immaterial; that the same was received in evidence over this objection and marked "Plaintiff's Exhibit No. 14".

That on November 22nd, 1911, the taking of testimony was resumed and L. J. Simpson was produced as a witness on behalf of the defendants and after being duly sworn testified in substance as follows:

That he was thirty-four years of age, resided at North Bend and had lived on Coos Bay a little more than twelve years; that he was Manager of the Simpson Lumber Company during that time, was familiar with the booms in question and had dealings with the plaintiffs; that the customary charge to his company had been sixty cents per thousand; that up until two years before a certain protion of the boomage had gone to Dean & Company or to Merchant as Receiver of the company, or to the Dean Lumber Company, just what amount or proportion the wit-

(Testimony of L. J. Simpson)

ness could not remember, but at the suggestion of the plaintiff Bernitt witness said that he thought the arrangement was $12\frac{1}{2}$ cents per thousand to Dean & Company and $12\frac{1}{2}$ cents to the plaintiffs; that this arrangement continued until some time after the Smith Company bought in and plaintiffs did all rafting for some time thereafter, as witness thought, in 1907 and 1908 under the old arrangement; that the last logs under this arrangement witness thought, were delivered in 1908 and 1909, but about that time he received word from the Smith-Powers Logging Company or the C. A. Smith Lumber Company to pay them the entire amount of the rafting; that this notice was given in the fore part of 1909 and the Simpson Lumber Company informed the plaintiffs of the notice from the Smith Company.

Witness then testified, over defendants' objection that the same was not the best evidence, that it was a fact that for the logs that were caught and received in that boom the rafting and boom charge had been credited to plaintiffs on the books of the Simpson Lumber Company and that the Simpson Lumber Company had been rendering the plaintiffs statements therefor up to the time the notice was received from the Smith Company.

Witness was then shown an instrument purporting to be a statement of the logs delivered and the scale thereof which was received in evidence subject to defendants' objection that it was incompetent, irrelevant and immaterial, and was marked "Plaintiffs' Exhibit No. 15"

(Testimony of L. J. Simpson)

the witness then stated that Plaintiffs' Exhibit No. 15 was a statement of the logs received and the number and scale of them; that it was one of the statements of the Simpson Lumber Company, and the notice spoken of was received just before the deliveries included in this statement were completed, but that the Simpson Lumber Company didn't refuse to accept any logs delivered by the plaintiffs. Three papers were then shown the witness and identified by him as monthly statements issued by the Simpson Lumber Company, and were received together in evidence and marked "Plaintiffs' Exhibit No. 16"

PLAINTIFFS' EXHIBIT No. 16.

MONTHLY STATEMENT

OFFICE OF
SIMPSON LUMBER CO.

NORTH BEND, OREGON, . . 190

E. W. BERNITT

Please examine this Statement and
Report any Errors at once.

1908	Debit	1907	Credit
Jan 30	To Cash 100 00	Dec 13	By Rafting Pace Logs
			24 51
		16 "	" 4 95
		18 "	" 85 63
		1908	
		Jan 1	" Balance 115 09

(Testimony of L. J. Simpson)

				Jan	2	“	Rafting		71	85
					4	“	“		69	01
					7	“	“		74	08
					11	“	“		57	62
					16	“	“		51	25
					27	“	“		58	52
					30	“	“		57	56
									<hr/>	
									554	98
							Less Debit		100	00
									<hr/>	
				Feby	1	“	Balance		454	98
1908								1908		
Feby	26	To Cash	200	00	Feby	4	By Balance		454	98
	29	“ Error				4	“ Rafting		109	74
	Rafting	Dec	23	75						
			<hr/>			17	“ “		62	42
			223	75		26	“ “		58	29
						27	“ “		53	44
									<hr/>	
									738	87
							Less Debit		223	75
									<hr/>	
				Mch	1	“	Balance		515	12

(Testimony of L. J. Simpson)

MONTHLY STATEMENT

OFFICE OF
SIMPSON LUMBER CO.

NORTH BEND, OREGON, March 1 ' ' 1908

E. W. BERNITT

Please Examine This Statement
And Report Any Errors At Once.

			Debit	Credit
Mar 6	To J. Krick	Mar 1st Balance	75 00	515 12
Apr 20	"	Mar 2 By Raftg 2 Rafts	77 00	107 66
May 13	"	" " 1 "	250 00	24 87
			<hr/>	
			402 00	112 55
				4 00
				<hr/>
				764 20
				402 00
				<hr/>
				362 20
				2 50
				<hr/>
				364 70

(Testimony of L. J. Simpson)

Witness then testified that the Simpson Lumber Company had but one account with Bernitt and that a debit of \$600.00 as against the credit of \$304.60 left a balance against his personal account; that the Simpson Lumber Company received both a written and an oral notice from the Smith-Powers Company, and identified the papers shown him as one of the written notices which was then offered and received in evidence as "Plaintiffs' Exhibit No. 17"

PLAINTIFFS' EXHIBIT No. 17.

C. A. SMITH, President A. H. POWERS, Vice-Pres.
and Gen. Mgr. C. L. TRABERT, Sec. and Treas.
SMITH-POWERS LOGGING CO.

MARSHFIELD, OREGON,

March 6th, 09

Simpson Lumber Co.

North Bend, Oreg.

Gentlemen:—

Enclosed find our bill for rafting logs and piling from Coos River Boom to your North Bend Mills as per your statement. Understand that Mr. Wittick & Burnett have a claim for rafting some of these Logs, which claim we will take care off and make settlement according to work performed by them.

Owing to our payday being due we will expect your check for this amount by Tuesday next to help us out on same thanking you for this in advance we are.

Yours Truly,
SMITH POWERS LOGGING CO.
By A. H. POWERS.

(Testimony of L. J. Simpson)

Witness further stated that he thought there was another written notice received a short time prior to the time of the one placed in evidence.

Upon cross examination witness stated that Mr. Powers in representing the Smith-Powers Logging Company had numerous conversations with the witness with regard to the boom, soon after Mr. Powers came to Coos Bay; that witness and Mr. Powers at that time discussed the proposition of going in together equally, half and half, and purchase land and build booms at the mouth of Coos River.

That thereupon defendants, with plaintiffs' consent, made the witness their own, and he testified: that at that time Mr. Powers claimed, as witness thought, that the Smith Lumber Company owned the Coos River booms and that the Smith-Powers Logging Company claimed to have purchased it from C. A. Smith or whoever purchased the Dean interest, and contemplated the purchase of other land to complete the boom; that witness agreed to go into the deal if Captain Simpson approved of it, and with them own the boom, but that Captain Simpson thought that the prices asked for some of the land which they wanted were too high and Mr. Powers told the witness, at what date he could not remember, that through purchase of the Dean Lumber Company they were the sole owners of the boom, that they would continue to do the booming at the old charge and that the Simpson Lumber Company would be expected to pay

(Testimony of L. J. Simpson)

them the money for it; that the Simpson Lumber Company paid some money to Bernitt and Wittick prior to the time it received the notice aforesaid, and it rendered the Smith-Powers Company a statement showing what had been paid plaintiffs; that since that time the Simpson Lumber Company had settled regularly with the Smith-Powers Logging Company.

Witness further testified that he was familiar with the booms in question and that since Mr. Powers took charge they had been greatly enlarged and improved, that the Lower Boom was practically cut in two and quite a piece added to it, and the Upper Boom was extended and improved; that the Government engineers refused to permit the boom to extend clear across the channel and it was necessary on account of their action to take up only half of the channel; that it was necessary to abandon all one side of the old boom and to put a new side right up the middle of the channel; that the portion of the old boom retained was strengthened and a large pocket was added to the lower end of the boom that would hold several million feet of logs.

Upon cross examination witness stated that he remembered having a conversation with Mr. Bernitt and Mr. Wittick in relation to going in jointly with them and the Smith-Powers Company in the ownership and construction of the boom, and in this connection witness testified as follows:

“A. Well when Mr. Powers and I discussed the matter of going in on the boom he claimed that the

(Testimony of L. J. Simpson)

Smith-powers people owned the boom and that Mr. Wittick and Bernitt had no interest in it—As he explained it to me, he considered their interest was a working interest, to do rafting, and I said to him that if that was the case that we would be agreeable to go in with them to build the boom and extend it, and to go in with them on the investment, but of course I knew nothing personally in regard to what the ownership of the boom was.

Q. You knew what Mr. Bernitt and Mr. Wittick claimed, didn't you?

A. Yes.

Q. And was that claim of ownership discussed with Mr. Powers?

A. It was.

Q. Do you think that was before the extension of the boom and the enlargement of it?

A. Yes I think it was—Or rather, I think—I won't say definitely whether it was before then or not, but it was about the time the boom was being extended—I cannot tell you whether they were working on it when we talked it over or not''.

Witness then testified at the time part of the improvements had not been made, but according to his recollection some of the improvement work was being done at the time of this conversation, and in answer to the question as to whether he had inspected the boom he said that he had been over the boom four or five times or possibly eight or ten times and the extensions at the lower end of the boom consti-

(Testimony of W. T. Merchant)

tuted a separate pocket and as they came down the river logs had to go through the main river boom to get into the pocket; that half of the old boom was rendered useless by the action of the United States engineers in forcing the channel to be kept open; that the old piles and sticks are still there and in one or two instances in cases of emergency they have been used when the main channel had been closed, to take care of the logs.

W. T. Merchant was thereupon recalled as a witness on behalf of the plaintiffs and further testified in substance as follows:

Witness was shown a large folio book marked "Ledger 1890—'1 and '2", and testified that the same was a ledger of E. B. Dean & Company from January 1890 to December 1892, that he knew the hand-writing therein and knew it to be a book kept by E. B. Dean & Company at that time;

Upon cross examination the witness testified that he presumed he had seen some of the entries made in the boom as he was working for the company at that time but did not know whether he had seen any of these particular entries; that he knew it was the book of the company because he knew the hand-writing; that he hadn't had custody of the books but that the hand-writing was that of Phipps and Ed Dean and that all he knew about them was that they were the books of the company because they were about company affairs and because they were

(Testimony of W. T. Merchant)

in the hand-writing of the book-keepers employed at that time.

Upon re-direct examination, witness further testified that in 1890 and 1891 he wasn't on Coos Bay but that as Manager of Dean Lumber Company, the successor of E. B. Dean & Company, and C. H. Merchant as receiver of E. B. Dean & Company, he had occasion to examine these books and knew that they were the books of the company. The book in question was then received in evidence, over the objection of the defendant as incompetent, irrelevant and immaterial, and as not sufficiently identified or proven to be a book of the company or a book of original entry, and was marked "Plaintiffs' Exhibit No. 18". Witness was asked to examine the account of E. W. Bernitt on page 318 of said book and thereupon gave the following testimony:

"Q. What is this entry? (referring to same page)

A. It says; November 21st, 1890, Coos River Boom, but does not state what for, \$70.00.

Q. You will please examine Coos River Boom account on page 557 of Exhibit No. 18 and state of what the items consist.

JOHN D. GOSS: Same objection, and the further objection that it calls for the conclusion of the witness.

A. May 9th, Credit by 218 logs 139,350 feet at \$4.00—that amounts to \$557.40.

Q. You will please examine page 630 of Exhibit No. 18, Coos River Boom Account, and state if you know of what the items consist.

(Testimony of W. T. Merchant)

JOHN D. GOSS: Same objection.

A. It just says; By logs—this is May 4th, 1892—
\$121.20

Q. You will please examine this book marked
“Ledger, Oct 1st, 1899, to Sept 1st, 1901”, and state
if you know what it is.

A. Yes it is the Ledger of C. H. Merchant as
Receiver from October 1st, 1899, to September 1st,
1901.

Q. Do you know this to be a book kept by Mr.
Merchant as Receiver of E. B. Dean & Company
during that period?

A. Yes sir.

Q. Do you know the hand-writing?

A. Yes.

Q. Whose hand-writing is it in?

A. E. W. Dean's.

Q. What position did E. W. Dean hold?

A. He was book-keeper for C. H. Merchant as
Receiver of E. B. Dean & Company.

Q. Do you identify this as the book kept by him
for C. H. Merchant as Receiver of E. B. Dean &
Company?

A. Yes.

The book referred to was then offered in evidence
and submitted to the attorney for the defendant
for his inspection.

JOHN D. GOSS: I make the same objection
to this book offer as to the previous one.

The book referred to was then received in evidence,

(Testimony of W. T. Merchant)

subject to the foregoing objection, and for the purpose of identification was marked "Plaintiff's Exhibit No. 19".

Q. Mr Merchant, I hand you a book marked "Journal, January 31, 1898 to June 30, 1900" and ask you to state if you know what book this is, and by whom kept?

A. It is the Journal of C. H. Merchant as Receiver for E. B. Dean & Company from January 31st, 1898 to June 30th 1900.

Q. Do you identify that as the book kept by C. H. Merchant as Receiver for E. B. Dean & Company during that period?

A. Yes.

The book referred to was then offered in evidence and then submitted to the counsel for the defendant for his inspection.

JOHN D. GOSS: Same objection.

The book referred to was then received in evidence subject to the foregoing objection, and for the purpose of identification was marked "Plaintiff's Exhibit No. 20".

Q. You will please turn to page 341 of Plaintiff's Exhibit No. 19, to the Coos River Boom account, and state if you know of what the several items consist.

JOHN D. GOSS: Same objection, and the further objection that the witness has not shown himself qualified or competent to answer, and that he has not, and is not familiar with said entries or the occasion of their having been made, and has no

(Testimony of W. T. Merchant)

knowledge of the same, except from the books themselves.

(The witness refers to Plaintiff's Exhibit No. 20 and then answers)

A. October 17th, 1899, Coos River Boom, 2160 feet of rough fir \$17.28; On the 19th, same month, 572 pounds of chain at 10 cents \$57.20; On November 27th, Coos River Boom, to sundries \$128.76; On November 30th, Coos River Boom \$6.00; December 1st, Coos River Boom to sundries \$14.50; December 19th, Coos River Boom to Christensen & Johnson, per bill \$205.34; December 30th, to merchandise \$21.70; January 4th, 1900, Coos River Boom to Stmr. Alert, verbal order \$3.50; On January 9th, Coos River Boom to rafting 3014 feet a .35 \$1.05; On January 20th, 1900, 310 pounds rope \$55.80; 300 ship spikes \$15.00; February 13, 1900, Coos River Boom to W Bernitt, rafting 3478 feet of logs a .35 \$1.22; Coos River Boom to Steamer Alert \$2.00; April 9th, Coos River Boom to William Bernitt, 29 days labor a \$2.50 \$72.50, April 30th, Coos River Boom to Deubner & Co., bill for October & November, 1899, \$12.70; October 16th, to Cash \$5.00; November 24th, To steamer Alert \$3.50; November 30th, to merchandise \$4.75.

Q. You will please turn to pages 200 and 201 of Exhibit No. 19 in the account of W. Bernitt and state what the items marked "Coos River Boom" consists of.

(Testimony of W. T. Merchant)

JOHN D. GOSS: Same objection to this, and the further objection that these entries and this account have not in any-wise been identified or properly placed in evidence.

(By reference to Plaintiff's Exhibit No. 20, the witness answers)

A. April 9, 1900, Coos River Boom to William Bernitt, 29 days labor at \$2.50, \$72.50.

Q. Mr. Merchant, I hand you a book marked "Ledger, 1883 and 1884", and ask you to examine it and state if you know what this is.

A. It is the Ledger of E. B. Dean & Company from January 1st, 1883, to December 31st, 1884.

Q. Do you know in whose hand-writing that book is?

A. Yes. sir.

Q. Whose?

A. Sam Dean's and F. M. Phipps'.

Q. Who were F. M. Phipps and Sam Dean?

A. They were book-keepers for E. B. Dean & Company during the life of this ledger.

Q. Were you personally acquainted with them?

A. Yes sir.

Q. Have you had the custody of these books at any time yourself?

A. No, but I have referred to them quite often.

Q. Can you identify that as the book kept by E. B. Dean & Company at that time?

A. Yes sir.

Q. You know it is the book?

(Testimony of W. T. Merchant)

A. Yes sir.

The book referred to was then offered in evidence, and the same was then submitted to the counsel for the defendant for his inspection.

JOHN D. GOSS: Same objection to this book-offer as to the previous book-offer.

The book referred to was then received in evidence, subject to the objection, and for the purpose of identification was marked "Plaintiff's Exhibit No. 21".

Q. You will please examine the account of William Bernitt on page 480 of Plaintiff's Exhibit No. 21 and state if you can tell what the items "Coos River Boom" are for.

JOHN D. GOSS: Same objection.

A. No sir, I cannot—Not without the Journal—It doesn't state at all what any of them are for—I would know if I saw the Journal.

Q. I now hand you a book marked "Journal, Day-book, E. B. D. & Co., July 31, 1893, to March 13, 1895" and ask you if you know what that is?

A. Yes sir, it is the Journal of E. B. Dean & Company from July 31st 1893, to March 13th, 1895?

Q. Do you know in whose hand-writing this Journal is written.

A. Yes sir.

Q. In whose?

A. E. W. Dean's.

Q. What position did E. W. Dean hold with the firm of E. B. Dean & Company?

A. Book-keeper.

(Testimony of W. T. Merchant)

Q. Do you identify this as the book kept by the Company?

A. Yes, I do.

Q. You know of your own knowledge that it is the book kept by the firm of E. B. Dean Company during that time?

A. Yes.

The book referred to was then offered in evidence and afterwards submitted to the attorney for the defendant for his inspection.

JOHN D. GOSS: Same objection as to previous book-offer.

The book referred to was then received in evidence, subject to the foregoing objection, and for the purpose of identification was marked "Plaintiff's Exhibit No. 22".

Q. Mr. Merchant, I now hand you a book marked "Day-book, from July 1st, 1887, to September 1st, 1888", and ask you if you know what it is?

A. It is the Day-book of the firm of E. B. Dean & Company from July 1st, 1887, to September 1st, 1888.

Q. In whose hand-writing is that book?

A. It is in the hand-writing of Mr. F. Bischoff.

Q. Who was Mr. Bischoff?

A. Mr. Bischoff was the book-keeper for E. B. Dean & Company during that period of time.

Q. You have seen him write, and know he was in their employ?

A. Yes sir.

(Testimony of W. T. Merchant)

Q. Do you identify this as the book kept by the firm during the period of time mentioned?

A. Yes.

At this time the book referred to was offered in evidence, and then submitted to the counsel for the defendant for his inspection.

JOHN D. GOSS: Same objection to this as to the previous book-offer.

The book above referred to was then received in evidence, subject to the foregoing objection, and for the purpose of identification was marked "Plaintiff's Exhibit No. 23".

Q. Mr. Merchant, I now hand you a book marked "Ledger, E. B. D. & Co., 1893-1894 & 1895" and ask you to state if you know what it is?

A. Yes, it is the Ledger of E. B. Dean & Company for the years 1893, 1894 & 1895.

Q. Do you know in whose hand-writing it is?

A. Yes.

Q. In whose hand-writing is that book?

A. E. W. Dean's.

Q. You have seen him write, have you, and know his writing?

A. Yes.

Q. Do you identify this book of your own knowledge as being a book kept by the firm during that period of time?

A. Yes.

Now at this time the book referred to was offered in evidence, and then attorney for plaintiff submit-

(Testimony of W. T. Merchant)

ted the same to attorney for the defendant for his inspection.

JOHN D. GOSS: Same objection to this as to former book-offer; and the further objection that the book referred to has not been shown to be a book of original entry.

The book referred to was then received in evidence, subject to the foregoing objection, and for the purpose of identification was marked "Plaintiff's Exhibit No. 24".

Q. Mr. Merchant, I hand you a book marked "Journal, Day-book, E. B. D. & Co., Sept. 30, 1891, to Aug. 1, 1893", and ask you if you know what it is?

A. Yes, it is the Journal Day-book of E. B. Dean & Company from September 30th, 1891, to August 1st, 1893.

Q. In whose hand-writing is that book?

A. F. M. Phipps' and E. W. Dean's.

Q. Do you identify that book as the book kept by the firm of E. B. Dean & Company during that period of time?

JOHN D. GOSS: I object to this as incompetent, irrelevant and immaterial, as not properly identified, as not shown to be a book of original entry, and on the ground that the portions thereof bearing upon this case are not identified or separated therefrom, and on the further ground that the witness has not shown himself competent or qualified to testify regarding the same, or to testify regarding the contents thereof.

(Testimony of W. T. Merchant)

The book above referred to was then offered in evidence, and then submitted to the attorney for the defendant.

JOHN D. GOSS: Same objection.

The book above referred to was then received in evidence, subject to the objection of attorney for the defendant, and for the purpose of identification was marked "Plaintiff's Exhibit No. 25".

Q. Mr. Merchant, I now hand you a book marked "Ledger, 1887-8 & 9", and ask you if you know what this is.

A. This is the Ledger of E. B. Dean & Company for 1887-8 & 9.

JOHN D. GOSS: I object to this question, and move to strike out the answer on the ground that no foundation has been made, and that the witness has not shown himself competent or qualified to answer the same.

Q. You may examine the book and state in whose hand-writing the entries are.

JOHN D. GOSS: Same objection.

A. It is in the hand-writing of F. Bischoff and E. W. Dean.

Q. Of your own knowledge do you identify this as a book kept by E. B. Dean & Company during this period?

JOHN D. GOSS: I make the same objection.

A. Yes.

The book was then offered in evidence and submitted to the counsel for the defendant for his inspection.

(Testimony of W. T. Merchant)

JOHN D. GOSS: Same objection as to the previous book-offer.

The book was then received in evidence, subject to the objection of the attorney for the defendant, and for the purpose of identification was marked "Plaintiff's Exhibit No. 26".

The witness further testified in substance that he had worked off and on for E. B. Dean & Company since he was twelve years of age up to 1889 and he worked for them again from 1902 to 1905; that from March 1899 to May 1903 he had worked for C. H. Merchant as Receiver; that he knew the hand-writing of the several book-keepers, Sam Dean, F. M. Phipps, F. Bischoff and F. W. Dean; that while in the employ of E. B. Dean & Company, C. H. Merchant, Receiver, and Dean Lumber Co. he had occasion to observe these books, and knew from his own knowledge they were the books kept by the Company concerning the transaction of their business during the term mentioned.

Upon cross examination the witness further testified that he didn't keep the books but used to refer to them right along when he was in the office, and had nothing to do with keeping them until the year 1900; that he never made any of the entries in those books and could not swear that he had seen any of the entries made, but that he had seen lots of entries and knew what particular kind of entries were made therein; that he knew these books were the books kept by the firm in the office.

(Testimony of J. J. Sullivan and E. W. Bernitt)

Thereupon, and on November 25th 1911, J. J. Sullivan was produced as a witness in behalf of the plaintiffs and after being duly sworn testified in substance as follows:

That he knew E. W. Bernitt, C. H. Merchant and C. F. Dillman and had worked off and on at the Bay City Mill; that several years before he had owned a gasoline boat and that one day about ten o'clock in the forenoon Mr. Merchant asked him to take C. F. Dillman and himself over to the mouth of Coos River, which he did and landed them at the rafting scow; that Mr. Dillman told him he had bought an interest in the company; that Mr. Bernitt was there and these passengers got off of the boat on to the scow and were talking together.

The plaintiff E. W. Bernitt being recalled further testified in substance that in the summer of 1908 just before the channel was split he had a conversation with Mr. Powers and stated the same as follows:

“Well I can't give the time, but it was prior to when Mr. Powers bought that tideland from the North Bend Company that owned it there, and he was telling me that they were holding the matter up on the price, and I forget how much he said they wanted per acre. Anyway I says to Mr. Powers: Mr. Wit-tick and me were ready to stand our part for improving the booms and splitting the channel, but when it comes to making large extensions I don't know whether we will be able to raise the money—Not the way

(Testimony of E. W. Bernitt)

you would like to have it done, probably. I said what's the matter with making Mr. Simpson a proposition and let him probably buy that mud flat and make the extensions and we will give him one-third interest in the booms, and we will retain the other two-thirds for what we have got over there. Mr. Powers said 'all right'—He said 'anyway to get that thing fixed up for we cannot use the booms the way they are', so I went down and met Mr. Simpson—L. J.—and he said that he could not do anything with that unless he seen the Old man, Mr. A. M. Simpson”.

Witness stated that this conversation must have been four or five months probably before the conversation in the office where Mr. Powers told him that he had no further interest in the boom; that it might have been in July, while when in the office was probably in November; that the extension to the boom taking in the mud flats was a large one, but the extensions that had really been used for catching logs in Coos River were not over five or six hundred feet long and half the width of the channel; that the main extension on the mud flat, he did not know that it was used for catching Coos River logs or not, as he had seen them taking logs over there and storing them there; that the piling and boom sticks on the east side of the channel are still used for catching logs; that they had them there and ready to use whenever there wasn't room in the boom and that they had used them in 1908 and 1909, and

(Testimony of E. W. Bernitt)

witness understood that they were used in 1910, and when the boom was already full they caught a half million feet of Simpson's logs in that channel; that the boom sticks and chains were still connected up with the piling on the east side of the boom the last time he had seen them; that the Clarence Gould logs that went to the C. A. Smith Lumber Company through the boom were "January 31, 1909, it was 1520,050 feet; During February and March it was 398,451 feet and 5959 feet, and 2819 feet of piling"; that other logs went through the boom that season for the C. A. Smith Lumber & Manufacturing Company, but that witness did not know their number or amount; that logs were caught in the boom for the years 1909 and 1910 and 1910 and 1911, but that the Smith Lumber Company had never rendered him a statement of them nor for the Simpson Lumber Company logs; that he understood from the scaler that there were 42 rafts and averaging them up he estimated there was over 10,000,000 for C. A. Smith Lumber & Manufacturing Co. for the rafting season of 1910 and 1911; that the boom sticks and chains that were originally placed in the boom at the westerly end that was afterwards abandoned were finally placed in the booms in controversy and are there yet.

Upon cross examination the witness further testified in substance that some time in the summer of 1908 Mr. Powers told the witness that parties were holding him up on the price of the mud flat, whereupon witness had suggested to Mr. Powers that Mr. Simp-

(Testimony of C. A. Smith)

son could probably secure the mud flat cheaper, and that Mr. Powers had then said "All right, anyway to get that fixed up over there so we can use it because we can't use that boom the way it is because the Government is kicking too much about keeping the channel blocked", but that witness did not speak of this matter to Mr. Powers afterwards.

That C. A. Smith was then produced as a witness on behalf of the defendant and after being duly sworn testified in substance as follows:

That he was one of the defendants and that in February, 1907, he purchased the boom in question from Mr. Dillman representing the Dean Lumber Company, the bargain being made in Sacramento; that he had previously seen the boom as he passed by in a launch and that was the only knowledge he had of the boom except the statement of Mr. Dillman that they had a boom there which they had maintained there for many years and that it was part of the assets of the Dean Lumber Company; that witness understood at the time of the purchase that the Dean Lumber Company was the absolute owner of the boom the same as it was of all the other property which they sold and deeded to him; that he turned the boom together with the old mill and some other property over to the C. A. Smith Lumber & Manufacturing Company and thereafter the boom together with some logging outfits, etc., was sold by that company to the Smith-Powers Logging Company; that at that time witness believed the price

(Testimony of C. A. Smith)

was agreed upon by Mr. Powers for the logging company and Mr. Oren as Manager of the Manufacturing Company, and as witness remembered was \$2000.00 for the boom and some tide flats; that he thought the price was submitted to him and he had every reason to believe that it was considered a fair valuation. In reply to a question "It wasn't simply a nominal valuation by reason of the fact that you owned a large interest in both companies, but was a deed 'at arm's length between the representatives of the two companies'", over the objection of plaintiff's attorneys, as incompetent, leading and suggestive and calling for a self serving declaration, the witness answered: "I might explain that I didn't wish to have anything to do with the valuation of this property that passed from one company to the other, being of course the principal stock-holder, but I preferred to leave that to Mr. Powers on the one side, who was a stock-holder, of course, in the Smith-Powers Logging Company and not a stock-holder or having an interest in the Manufacturing Company, and Mr. Oren, who was the Manager and stockholder in the Manufacturing Company, but who had no interest in the Logging Company".

Witness further testified that at the time of the purchase he had no knowledge, notice or information that the plaintiffs or any one other than then Dean Lumber Company claimed any right or interest in these booms, that he did not remember when he first heard of plaintiffs' claim, but first heard of such

(Testimony of C. A. Smith)

a claim many months afterwards, it may have been a year or more. And then the following questions were asked and answered by the witness:

“Q. Well, before that had you hear or understood that they had any working interest, or were handling the booms or were paying rental therefor?

A. Before when?

Q. Before you learned that they had claimed a half interest?

A. I do not remember what information I got when I learned about their interest the first time, but what the extent of claim was I do not know.

Q. Did you at any time get any information that they were handling the boom on a rental or basis whereby the booms depended upon the amount of logs handled, etc?

A. I don't remember what the information was. It runs in my mind that I had some information, received as I said many months afterwards—Whether it was the very first information I had I do not remember, but my recollection is that I had some information that there was a rental paid by them to the Dean Lumber Company of ten cents, a schilling, or fifteen cents a thousand, for the use of the boom, but when I received that information—I mean, whether this was the first information, that I cannot tell, but it runs through my mind that I had such information. I think without doubt that that came through Mr. Powers—what information I did receive after he had come here, which was in the summer or fall of 1907”.

(Testimony of C. A. Smith)

Witness further testified that he was President of both the Lumber and Manufacturing Company and of the Logging Company, but that there were other stockholders and a board of directors in each company; that from the time he first acquired the boom, Mr. Powers had had the practical management thereof; that since June, 1909, out side of his interest in the Smith-Powers Logging Company he had no personal interest in, or possession of the boom and had never entered into any agreement or understanding with anyone with regard to the payment or non-payment by the Simpson Lumber Company or any one else of any of the sums due for rafting or hauling logs; that at the time of the purchase he had the records and abstracts of title examined by an attorney to determine the title to all the property and did not discover that there was any record claim against, or defect in the title to the booms.

Upon cross examination the witness said that he saw the booms as he passed by in a boat about two months before he purchased them and did not then notice anyone working at the boom or whether there were any logs in them; that he bought the property some time in February, 1907; that there was an understanding as to what should be conveyed to the Lumber and Manufacturing Company and what to the Logging Company, but that probably the paper title to the boom passed direct to the Logging Company; that the understanding was that everything pertaining to the logging should be taken over

(Testimony of C. A. Smith)

by the Smith-Powers Company; that the agreement as to the Smith-Powers Logging Company that it should have title was made about the time it was incorporated; that the paper title may have passed about 1909, but the Smith-Powers Logging Company was in control of the property as owner long prior to that time; that at the time he bought he didn't have the property examined by an agent and didn't at that time investigate to see whether or not anyone was in possession of the boom, and if any one had been in possession he did not investigate; that to the best of witness' recollection the C. A. Smith Lumber & Manufacturing Company acquired whatever interest he had in this property in the Spring of 1907 and shortly afterwards their interest was transferred to the Smith-Powers Logging Company and he made a deed of it at the direction of the Lumber and Manufacturing Company; that the price agreed upon to the best of his recollection was \$2000.00, and that Mr. Oren and Mr. Powers went over the property, looked it over and agreed upon the value; that he did not know whether they took into consideration plaintiff's claims in fixing the price or not; that the witness was the principal stockholder in the C. A. Smith Lumber and Manufacturing Company and was not the holder of stock to any extent in the Smith-Powers Logging Company, but the C. A. Smith Lumber and Manufacturing Company was the heaviest stockholder in the Smith-Powers Logging Company; that his understanding at the time of the purchase was that the Dean Lumber Company was the abso-

(Testimony of Clarence Gould)

lute owner of, and in full possession of the boom and didn't know of any rafting business subsequent to that time between the Lumber and Manufacturing Company and the plaintiffs.

Clarence Gould was then called as a witness on behalf of the plaintiffs and after being duly sworn testified in substance as follows, to-wit:

That he was a logger and in 1908 was engaged in logging upon the west fork of Coos River, a stream emptying into Coos Bay; that he was then logging for the Smith-Powers Company; that he dumped his logs in the river and depended upon the freshet to bring them down; that he had first agreed with Mr. Bernitt that he should raft them from Allegay, but later it was understood between Mr. Powers and the witness and Mr. Bernitt and the witness that the logs were to be turned loose, caught in the boom and rafted from there by Mr. Bernitt, and that was the agreement between Gould and Bernitt also, and the boomage price to be twenty-five cents and the rafting price thirty-five cents per thousand; that the logs were accordingly turned loose and most of them caught in the channel outside of the boom; that the Lumber and Manufacturing Company paid for the logs after deducting the rafting and boomage charge amounting to sixty cents per thousand. Witness corrected his testimony and stated that his contract for the logs was with the C. A. Smith Lumber & Manufacturing Company.

(Testimony of E. W. Bernitt)

Upon cross examination the witness further testified in substance that he did not pay Mr. Bernitt for rafting, that it was the custom for the mills to hold out the rafting charge, although he had paid out some direct; that Mr. Bernitt and the Smith-Powers Company worked on the logs together, according to the recollection of the witness; that the witness did not know whether Mr. Bernitt delivered any of the logs independently or not and that the brands were "C" and "R. M"; that he thought his logs were put right in with the other logs going to the Smith mill and rafted together, but kept separate from the Simpson logs; that he was at the boom at first when they first commenced rafting and was there a few times afterwards, but spent little time on the boom.

Plaintiff E. W. Bernitt was then recalled on behalf of the plaintiffs and further testified in substance that he agreed to raft the Gould logs from Allegany to the mill for forty cents per thousand, and in explanation of how he came to work at them on the booms, testified; "Well, I was up at Allegany trying to raft them, and it kept on raining so that we couldn't work, and Mr. Gould seemed to get in a hurry to get them to the mill, and he thought he would get them in in time by letting them go through the boom, so he said he would go down and see Mr. Powers and if he would allow me to raft them logs he would turn them loose, and he said it would be all right and I could go down and raft them. I went down ahead

(Testimony of E. W. Bernitt)

of them then to prepare the booms and catch them, and while we were catching them—three or four days, I suppose it took—Mr. Powers started in already with a crew of men to make some of them up. Then we had the booms closed up and then we went down and started in too’.

Witness further testified that Mr. Powers wanted him to deliver two rafts to the mill the next day after the logs came down because the mill was out of logs, and wished them to try to see what they could do; that nothing was said about the price and witness helped store the logs, and most of the time kept on towing rafts to the mills because there were hardly any gasoline boats fit for the towing; that Mr. Powers had some boom sticks there but that most of the gear belonged to the plaintiffs; that the plaintiff was to get the regular price of thirty-five cents a thousand for rafting the Gould logs, but had never been paid by anyone; that the Gould logs, amounted to 1,924,460 and 2,819 feet of piling; that the Smith-Powers Company had logs and piling stored in the Upper Boom for at least a year; that the first batch of Gould logs were caught in the regular boom but that the bulk of them were caught in the channel and blocked the channel up; that when the booms got full they shut up the lower end of the channel and caught the logs in there and that the channel was blocked that year. Whereupon an instrument was placed in evidence as “Plaintiff’s Exhibit No. 27”, which was agreed by the parties to be a statement furnished by Smith-Powers Logging Company of the amount of logs and piling it claim to have passed through the booms from January first 1909 up to and including September 29th, 1911, which exhibit is as follows

(Testimony of E. W. Bernitt)

PLAINTIFFS' EXHIBIT No. 27.				1909.	
Credits.					
Jan.	1	Balance			319 61
Feb.	26	C. A. S. L. & M. Co.	Coos River Boom Expense.		
			Lockhart	92644 ' logs	57 59
		"	200	piling	942 06
		"	1525055 ' logs	"	59 07
Mar.	16	"	Lockhart	98455 ' logs	10 00
	19	Simpson Lumber Co	Steamer Liberty, Towing		2503 83
		"	Rafting		15 53
		C. A. S. L. & M. Co.	Lockhart	281844 ' logs	174 72
		"	562 ' piling		
		"	437777 ' logs		290 86
June	30	"	2819 ' piling		28 58
Oct.	30	"	Lockhart	47636 ' logs	14 97
Dec.	22	Simpson Lumber Co.	Credit by chain returned		297 95
	30	"	Rafting		73 45
	31	C. A. S. L. & M. Co.	H Blake	271044 ' logs	194 87
		"	4298 ' piling		
		"	1936 ' logs		1 52
		"	48 ' piling		11 49
		S. P. L. Co.	Lockhart	19146 ' logs	1716 99
			2861659 ' logs from No. 3 Camp		6713 09

(Testimony of E. W. Bernitt)

PLAINTIFFS' EXHIBIT No. 27—Continued.

COOS RIVER BOOM EXPENSE.

CREDITS.

1910.

Jan.	1	Balance			3560	91
	11	Simpson Lumber Co.	2872900 ft. logs			
			18196 " piling		1860	42
Feb.	18	Simpson Lumber Co.	2228430 " logs			
			18916 " piling		1478	78
	28	C. A. S. L. & M. Co.	Lockhart logs, 13123 ft		7	87
			Gould logs 4649 ft		2	79
Mar.	31	"	W. Stull logs 22455 ft		4	49
		"	H. Blake logs 317724 ft			
			piling 3648 ft		218	00
		"	C. Gould logs 8231 ft		4	94
		"	Lockhart logs, 19153 ft		11	49
Apr.	22	Simpson Lu'ber Co.	Piling 438 ft		3	28
			990918 ft logs			
			19574 ft piling,		742	68
			938657 ft logs			
			20139 ft piling		714	20
	30	C. A. S. L. & M. Co.	Lockhart 1004 ft logs			
			C. Gould 3227 ft "			
			Simpson 40690 ft "			

(Testimony of E. W. Bernitt)

Dec. 31	Blake, 18922 ft “	39 76
	37500 ft logs 122 ft piling	22 50
	C. A. S. L. & M. Co. 1910	2711 76
	Simpson Lumber Co 3090164 ft logs	
	27338 ft piling	2102 35
	F. Noan logs 42777 ft	25 66
	“ 50278 ft	30 17
	Lockhart logs 4677 ft	2 81
	Gould logs 551003 ft	330 60
	Simpson logs 2474 ft	1 48
	F. Noan logs 94019 ft	56 41
	H. Blake logs 9644 ft	5 79
	Debits	13939 14
		6914 52
	Credit Balance, Jan. 1, 1911,	7024 62
	CREDITS, 1911.	
Jan. 1	Balance,	7024 62
31	Simpson Lumber Co. 2548398 ft logs	
	3090 ft piling	1552 20

(Testimony of E. W. Bernitt)

Feb.	20	C. A. S. L. & M. Co	Simpson logs 8889 ft	5 33
		"	C. A. Gould logs 127934 ft	76 76
		"	F. Noah logs 276300 ft	165 78
Mar.	20	Simpson Lumber Co.	1350530 ft logs	909 90
			13306 ft piling	6 00
	31	C. A. S. L. & M. Co.	Simpson logs 10000 ft	211 36
		"	F. Noah logs 352275 ft	44 86
		"	" " 74772 ft	
Apr.	29	"	" " 16993 ft	97 59
			C. Gould " 226963 ft	7 80
June	30	"	C. Gould logs, 19505 ft	80
		"	H. Blake " 1336 ft	28 18
		"	E. W. Burnett, Rafting	3 74
		"	F. Noah, logs 9341 ft	
Sept	29	Simpson Lumber Co.	271548 ft logs	179 58
			2150 ft piling	
Total credits,				10314 50
Debits, 1911,				2322 17
Credit balance, Jan. 1, 1912				7992.33

(Testimony of E. W. Bernitt)

Witness then further stated that the statement (Exhibit No. 27) was correct so far as the Simpson Lumber Company logs were concerned, and the logs that C. A. Smith Lumber Company bought from Lockhart, Gould and Blake; that there should have been included in the statement about 4000 logs amounting to three million feet that came out between the 23rd and 26th of December, 1908; that there must have been three million feet more for 1910 and probably two million feet for 1911, and that there should be five million feet for 1911 and 1912; that the witness had seen the logs in the boom in 1908 and 1909, and the next season he saw them coming out and observed them coming down the river and in the boom.

Thereupon a statement of the Simpson Lumber Company of logs and piling going through the boom was received in evidence and marked as "Plaintiff's Exhibit No. 28"

PLAINTIFFS' EXHIBIT No. 28.

Logs and Piles delivered from Coos River Boom, Season 1911-12 to Simpson Lbr Co By Smith Powers Log Co

1912

Jany 23 211 Logs 291961 ft

25	220	"	243570	"	16	Piles	628	ft
26	202	"	234871	"	7	"	276	
27	242	"	167740	"	60	"	2686	
31	235	"	202054	"	60	"	2612	

(Testimony of E. W. Bernitt)

Feb	7	233	"	187774	"	60	"	2492
	10	239	"	187922	"	67	"	2808
	13	289	"	319954	"	32	"	1402
	16	243	"	261270	"	28	"	1146
	19	279	"	282558	"	72	"	2860
	22	256	"	226031	"	59	"	2322
	24	302	"	265861	"	80	"	3458
Mch	4	199	"	228624	"	16	"	704
	5	266	"	226525	"	50	"	2126
	8	248	"	254096	"	21	"	860
	13	225	"	192212	"	32	"	1312
	28	253	"	201784	"	54	"	2260
Apr	1	249	"	210288	"	50	"	2082
	6	231	"	206070	"	49	"	2060
	10	263	"	252226	"	39	"	1570
	15	207	"	255024	"	15	"	642
	16	234	"	296668	"	14	"	516
	26	229	"	229990	"	30	"	1146
Totals	5555			5425073	"	911		37968

Witness then stated that the approximate number of feet that went through the boom for season of 1911 and 1912 for Simpson Lumber Co. was five million four hundred thousand feet of logs and 911 piling, and that witness knew this from the statement rendered.

Whereupon and on the 19th day of July 1912 the plaintiffs rested their cause.

(Testimony of W. J. Ingram)

Thereupon W. J. Ingram was called as a witness for the defendant and after being first duly sworn testified in substance as follows:

That he was a raftsman and foreman of the C. A. Smith Lumber Company living at North Bend Oregon; that he had rafted and worked on booms, including work on rafts and booms and river work with logs steadily for twenty-four years in Wisconsin, Michigan, Minnesota, Idaho, Washington, Montana and Oregon, and was familiar with booms and the cost and character of material used and required in building and maintaining booms and was familiar with the booms in question; that he first saw these booms in the winter of 1908 and 1909 and took charge of the booms between Christmas and New Years 1908 and remained in charge until March 5th 1909, at which time he took a short vacation, returning and again taking charge of the booms June first 1909 and remaining so in charge until July first 1911; that he was foreman of the boom for the Smith-Powers Logging Company and looked over the booms thoroughly when he first took charge; that they did not do much repairing while they were rafting logs, but after that they kept repairing them all the time; that he then found them in rather poor shape to raft; that some of the piling was pretty old and kind of rotten at the top and some had been driven new all the way along down the center of the channel; that Mr. Varney was still driving there for the Smith-Powers Company while the rafting was going on; that the

(Testimony of W. J. Ingram)

old piling along the shore was pretty well rotted at the top and decayed from water; that they were so rotted down as to impair their usefulness as, if a pile used in the boom is rotted below high water it is of no particular use for the boom would go over it; that quite a number of these piles were rotted below high water; that they would just hit them with an ax and the tops would fall over; that in the booms along the shore the chains were pretty well eaten up and the sticks pretty well water-logged, good many of them sunken and some of them under water; that he would not consider the double booms safe to hold logs and the single booms were water-logged along the shore, and the chains pretty well rusted; that the logs in the sheer boom were water-logged and very small and the chains rusted quite badly; that the sheer booms were three logs wide and looked as though they had been in use a long while; that the cross pieces were very old and had been just nailed across and not mortised in, and the dolphins were quite badly rotted away; that there were logs in the boom when he took charge; that the boom did not break or cause any trouble the first winter; that he went all over the boom and repaired it from one end to the other, putting in new piling and new dolphins, because they were of no use, and also one obstructed the channel and in order to straighten the boom, he blew out three of the old dolphins that were obstructing the river, and went the whole length of the boom putting in new sticks and new chains and new cross pieces and new cross-

(Testimony of W. J. Ingram)

chains; that down the center of the Lower Boom it was all new and along the shore they put in a stick wherever needed, put in some new piling and built new sheer-booms; that two of the sheer-booms were strengthened up by putting in the logs on the sides and mortising them in; that they built six new dolphins for both booms, a dolphin being a cluster of from four to fifteen piles fastened with cable and sometimes planked along the sides and mortised in. That they also strengthened the old dolphins by driving piling between the old piling and around the back of them; that when witness went there the old boom consisted principally of a row of piling down each side of the channel with a single row of boom sticks attached, and in addition there was the Old Upper, or Creamery Boom; that while there the witness extended the Creamery Boom which was originally possibly 1500 or 1600 feet long, until as extended it was possibly a mile long; that they repaired the Creamery Boom by driving piling where ever they could get them in, re-chained wherever broken, and put in boom sticks where ever they could repair them; that at the lower end of the Lower Boom they put in a new extension which witness judged would contain forty acres and the other extension from where old boom ran down he thought would be 1500 or 1600 feet long; that he had counted the new and the old piling in the boom and made a memorandum of them and, using the memorandum to refresh his memory, witness stated that he counted in the Creamery Boom 159 old piling and that there are

(Testimony of W. J. Ingram)

610 new piling; that he included all the piles in the boom or in use in that part of Coos River in connection with it on both sides of the river; that there were some old piles not included in the count because they were up on shore and in use; that in the Lower or main Boom there were 121 old piles in use and 768 new piles in use; that nine-tenths of the boom sticks were new, that is put in since the witness first went there. Witness further testified that in re-building and fixing the boom he used old sticks that they found on the mud flats, and drift stuff, and that they re-chained all the boom; that he was familiar with the cost of booms and inspected the boom carefully when he first went there, and disregarded the value of any boom right or land adjacent thereto. At which point in testimony plaintiffs moved to strike out all testimony and questions asked concerning the reconstruction of boom, extensions or rebuilding of boom, and over objection of plaintiffs that witness had not shown himself qualified to testify, witness stated that the old booms were worth possibly four or five hundred dollars; that he had aided in building and repairing booms in Washington, Idaho, Wisconsin and Oregon; that he built one entirely for McGolderick Company in Spokane and for Cook Brothers at Oconto, Wis, and for D. P. Lewis at Coeur d'Alene, Idaho, and had worked in building and repairing booms all his life and had learned the cost of that kind of work and the cost of materials, etc, used therein; that it would only take about one-third the number of new piling to adequately replace

(Testimony of W. J. Ingram)

all the old piling and that the way the old piling was put in, much of it would be better if it were out of there; that when he took charge of the boom there was no stiff boom and no double boom there, and that at the date of testifying there was about three miles of double booms and one and a half mile of sheer boom; that after he took charge of the boom in December, 1908, he had four or five men working with him there right along during the rafting season and three men all summer long after that; that he stayed there all the next winter and the next summer until July and was there practically all the time when logs were running and were caught in the boom, and when logs were being rafted from the boom; that he observed Mr. Wittick and Mr. Bernitt and that the plaintiffs didn't aid in repairing the boom but did help make up rafts occasionally and tow them away to North Bend or Marshfield whenever the occasion offered; that in some places it is customary for the raftsmen engaged in towing to help make up the rafts and in some places not; that some of the raftsmen aided here and some did not, but that it is customary for them to help; that the plaintiffs did some work making up rafts but didn't open the sheers or open the booms, or do anything of that kind to witness' recollection excepting that he saw Mr. Bernitt closing the sheer boom one time when the witness was working above.

The witness further testified that he kept the time of the men working at the boom and kept record

(Testimony of W. J. Ingram)

of the time put in by Mr. Bernitt and Mr. Wittick and their men.

Upon cross examination the witness further testified in substance that he started to work about Christmas time and drove the upper river from Hodges Creek down first; that he was six or seven days cleaning up the logs and went to work on the boom proper January 2, 1908; that he had never worked in tide water before coming to Coos Bay but that he built three booms at Spokane and there went into the open market and bought piling and boomage for the booms from the farmers; that those booms had to be driven a little more substantially because they were in stronger and swifter water, and this other boom experience was in similiar water; that there were about twice as many logs came into the boom the second year he was there as the first year, and that the next year was about the same as the one preceding; that some repairing had been done to the boom before he took charge consisting of the row of piling down the center of the channel and the pocket, and that the old Creamery Boom would hold about 200 average logs, and that as extended it could hold about 8000 logs; that the Creamery boom as extended would be about one mile long and the old boom something like 500 feet long; that he could not say positively how many piling were taken out, but if he remembered rightly he took out some at the upper end of the Creamery Boom to straighten up the channel; that he counted he thought 121 piling in the old

(Testimony of W. J. Ingram)

Creamery Boom that were still there; that in breaking off the piling with an ax they knocked off a foot from some of them, two feet from some and three feet from some of them; that they continued to use these old piling but that they would not be useful on high water; that these piles were not in use at the time, but some of them you might say were in use, still he would not say that they were; that you might say the piles that were broken were still in use as the boom sticks were attached to them and the boom sticks were in use, as they served the purpose of holding logs in the boom; that a person ought to drive piles over there for a dollar apiece; that piling averaging 45 feet long would cost probably \$1.75 apiece; that some few of the old sheer boom sticks and boom chains may be around there yet; that the old Creamery Boom would be 1500 feet long; that it ran in a "V" shape, wider at the lower end than at the upper; that the lower end might be 350 feet wide and the upper end witness would judge was possibly 100 feet wide; that the west or shore side is as long as the other side and there is a single row of piling along the channel side; that there was an old sheer boom that used to go across the upper end and a little gate at the lower end; that on the shore side of the boom there was just a single row of piling and witness assumed that there would be 4500 lineal foot of sticks, and sticks cost about seven or eight cents per lineal foot; that the sticks were different lengths but he believed would average about seventy feet long and were fastened together with iron chains and staples;

(Testimony of W. J. Ingram)

that what staples he bought he paid ten cents apiece for at the mill and there would be two staples for each chain; that the sheer boom at the upper end of the Creamery boom was used at the beginning of December, 1908, and witness didn't consider it very safe, although he had no trouble with it and used it that winter and the next year until the boom was extended; that witness ceased working there July 9th, 1910, and did not know what had become of the sheer boom since; that it might have been 250 feet long, was two sticks wide and was fastened together with cross pieces nailed on the top and little cross chains; that there were about five or six piling driven there for the sheer to rest against, fastened together with a couple of planks at the top.

Witness further stated that he could not estimate the value of the sheer boom as the sticks were worth less than the boom sticks in the other part of the boom because they were water-logged; that there was a cluster of five or six piling at the lower end of the boom but no sheer boom there, and the logs were let out by a little gate; that at the head of the Lower Boom there were four dolphins and that in making the changes two of them were blown out and new ones placed in there; that piling was driven behind the old ones and the new dolphin was built farther out in the channel for the sheer boom to rest on, and the new dolphins were not built in the same place as the old ones; that the Lower Boom at the time witness went there would hold possibly 6000 logs

(Testimony of W. J. Ingram)

of average size, running nine or ten hundred feet to the log, and the present Lower Boom including the pocket would hold in the neighborhood of twenty to twenty-five thousand logs, and that this included the forty acres included in the pocket; that witness could not say how many piles in the old Lower Boom had boom sticks fastened to them, but that there wasn't very many as the middle channel was all built new and all around the mud flat was new; that this new work was done after witness came to the boom, although he thought Mr. Varney had built some of it before that; that Mr. Varney had driven a row of piling down the center of the channel and had driven piling here and there on the shore side. That in driving along the shore he put them in where ever he could get the driver close enough to drive them and that some of the old piling was in line and some of it wasn't; that there was old piling driven all through the mud flat, but witness did not know what they were for; that the witness put two or three new sticks in across a little channel and another one in another little channel about half way; that when he came there he saw no new sticks that had been put in the boom on the shore side, only down the center; that the old Lower Boom was about 2500 feet long and consisted of a row of piling on each side of the channel; that the piling was driven zig-zag and the boom sticks run in between them; that he would not say there were more than ten new piling driven on the outside of the old boom when he went there and that there were no old piling removed except what he found

(Testimony of W. J. Ingram)

were rotten at the top; that there were some seventeen or twenty old piling that they broke off, but that in counting 157 old piling left in the boom these stubs were included as they would be in use on low water, but any of those that were broken off would be under water on extreme high tide; that the old piling amounted to 137, not counting the stubs, and wasn't quite as high as the piling in the Upper Boom; that they might have stuck out of water about two feet or two and a half feet on high tide; that witness sawed off all of the piling about the same distance above the water so as to make them alike and so as to tar the tops; that the channel varies in width all the way along, but at the upper end of the Lower Boom is a little bit narrower than below, being probably in the neighborhood of 120 feet wide at the upper end and possibly 200 feet wide at the lower end; that the sticks around the Lower Boom were connected together the same as those in the Upper Boom and were worth about the same amount; that quite few of them went adrift, including a sheer-boom, and the time the freshet broke it in two, that being in the year 1910 and 1911; that that sheer-boom was being used to catch logs then but was all composed of old logs, and the pressure of the logs against it made it go out; that the witness knew of four or five boom sticks that he turned adrift some time in January or February of 1909; that practically all the boom sticks that had been in use the year previous were in use when witness took charge, except four or five, and that the principal run of logs for the winter of 1908

(Testimony of W. J. Ingram)

and 1909 started on Christmas day, some of them from Hodges Creek and some Gould logs and some Simpson logs; that on the 18th logs stopped running and they started rafting; that the plaintiffs were there at the time helping to raft logs and tow them away whenever witness asked them to take a raft, and also helping some to make uprafts; that when the witness went there on the 2nd of January the booms were pretty full of logs already and those logs were caught by Mr. Powers; that about the time witness came to the boom he thought he saw the plaintiffs there with a boat; that plaintiffs had their logging scows over there at the boom and their crew of men for a few days, one of them would be away and the other would be there, that plaintiffs were not always there but witness stayed there himself all the time, camped there at night in a little scow and lived in it while plaintiffs did not live there; that plaintiffs were towing and that sometimes both of them would be away on the rafting, and in answer to a question whether Bernitt was not there all the time after witness went there, when logs were running, he said he did not know, Bernitt was away a good deal towing and he could not be there when he was towing; that the plaintiff Bernitt was towing a good deal at that time of the year and he could not be there on the boom when he was towing, and that witness didn't remember of ever seeing Wittick there that winter, although he remembered two men that worked for plaintiff Wittick being there; that witness remem-

(Testimony of W. J. Ingram)

bered hearing something about Wittick's little boy being drowned at that time.

Thereafter and on July 20th, 1912, the cross examination of the witness W. J. Ingram was continued, and witness testified in substance as follows:

That the sticks in the Lower Boom which he saw were a little larger than those in the Upper Boom; that they would average about 70 feet in length and they were fastened together with chain and staples and were not bored; that the chain was of different size, some $\frac{3}{4}$ inch and some 5-8 of an inch and some larger, but witness could not state definitely as they were pretty well rusted away, and after a chain lays in the water a while it is hard to tell its original size; that he had stated he thought there were 159 old piles in the Upper Boom and 121 in the Lower Boom, counting on both sides of the channel from the upper dolphin down; that he had counted them just two days before but had not counted them when he went to work on the boom; that there were probably more at that time as he had blown out some of them in the old dolphins, and didn't count those that were blown out; that the dolphin at the upper end of the boom is the old one that was originally there and it was still in use and nothing done to it, and the old sheer-boom was laying up against it, which is the same sheer-boom that was there when he first went to work on the job; that below this were two old dolphins that had been strengthened up with new piling since they

(Testimony of W. J. Ingram)

were put in; that they were nailed together with planking and that there would be about fourteen or fifteen piling in each dolphin; that there was some new piling driven between the old piling in the Creamery Boom; that Mr. Bernitt didn't have charge of the boom or the rafting in the season of 1908 and 1909; that Mr. Powers put the witness in charge and any time witness told Mr. Bernitt to take a raft away he did, i. e. for the Smith people, but the North Bend logs witness believed that he (Bernitt) and Wittick towed; that the first time witness came to the boom Mr. Powers was there with the boom crew from the mill working on the lower end of the Boom, rafting, and witness did not know who was catching the logs, that they were all strangers to him at that time; that he was working up the river driving for about a week, that he did not know who was around there when he was up the river, and that he remembered of seeing Mr. Bernitt closing the boom, he thought, and that he (Ingram) was a stranger then; that he remembered of Mr. Bernitt and Mr. Wittick taking some sticks up the river at that time; that there was some of the old piling pulled out of the Creamery Boom including two dolphins but he could not state how much, one on the shore and one on the Creamery side, and that in building the extensions to the Old Creamery Boom there was a little job where the old boom and the new one came together, but that he did not remember of there being piling taken out there; that the Creamery Boom is about 140 or 150

(Testimony of W. J. Ingram)

feet wide at the upper end of the old Boom; that witness did not have charge of the work in constructing the new Upper Boom; that there is piling driven now on the east side or Creamery side of the river very nearly up to Mr. Smith's place, but when witness went there it was all broken up and the logs went off over the flats; that there is a channel up above the Creamery and the logs went in there and stayed on the mud flat for a year or so; that there are old piling strung the whole length of the boom and there is a row of piling without any boom sticks extending up above the head of the Lower Boom that was used for tying rafts to in the early days, but there were no boom-sticks on it when witness went over there; that rafting sticks were tied to these piling and they rafted in the channel there.

By consent of the parties the defendant at this time introduced a map purporting to show the Lower Boom, which was received in evidence and marked "Defendant's Exhibit A", plaintiffs accepting the same for the purpose of showing the general outline and location of the boom, but not admitting its accuracy or the authenticity of the written matter thereunto attached. Witness then testified from the map that the Old Boom began at the point marked "Float" on the north side of the old channel; that there was some old piling below that but there was never any boom there; that the terminus of the boom-sticks and piling in the old boom would be about the South-east corner of the map; that on the north side

(Testimony of W. J. Ingram)

of the channel the boom-sticks ran from a point opposite the word "float" to a point where the North Channel intersects the main channel of Coos River, marked "dolphin"; that the old boom did not extend any farther to the South-east; that it did extend possibly one-eighth of a mile on the shore side to where it terminates above the Creamery; that when witness went to work there they were driving the rear end of the Creamery Boom and the Lower Boom was possibly two-thirds or three-fourths full; that when witness came down the river in January the boom was pretty well filled up with logs and there were logs on the east side of the boom in the channel, possibly twelve or fifteen hundred; that he thought there were two freshets that year after he went to work and he thought there was three or four million feet in the boom on the first of the year.

Upon re-direct examination, witness further testified in substance that in testifying to the value of piling he referred to new white cedar piling; that the old piling was practically all fir and hemlock which are not as valuable as white cedar and will not last as long; that at the time witness went there the piling in the Creamery Boom was most of it old but that some looked to have been driven that year; that the old piling looked to have been driven for probably twenty years or more; that the life of a fir pile in water of that character would be probably ten or twelve years, while piling that had been in twenty years or more would not be of as much ser-

(Testimony of W. J. Ingram)

vice; that he sawed off the old piles and tarred the tops, which had never been done to them before; that unless this is done the water runs down into the piles and they decay; that the old piling was just the ordinary size, and that his testimony with regard to the value of chains and staples was in regard to new material, and that iron deteriorated very rapidly over at the boom and he would judge the ordinary life of a 5-8 inch boom chain to be about seven years and that a half inch or 3-8 inch chain would last a shorter time; witness further testified, over the objection of plaintiffs that it was not proper re-direct examination, that he went over to the boom and re-chained it, putting in new chains everywhere; that there was as much of a freshet the first winter he was there as at any winter after; that the old boom-sticks along the shore were pretty small and would hardly hold a bird up and there were some of them, possibly six or seven inches through at the top end, and some of them might be a little larger; that the boom logs were old and were water-logged and a great many of them would not hold a person up; that some of them were broken in two and that witness put in quite a number of new sticks here and there all the way along; that there were boom sticks along the shore from the Creamery down and that the plaintiffs took some of them away from that shore; that the water in the old Creamery Boom was shallow at the lower end and the boom would be out of water at low tide, and the capacity of the boom was lessened because the logs would not pile up; that before the

(Testimony of W. J. Ingram)

Creamery Boom was fixed up they used to catch the rear of the drift in it, i.e. the logs that they turned off the banks when they would be cleaning off the banks of the river after the drive, which would be after the bulk of the logs had come down, and the strain on the booms in catching the rear would be much less than in catching the main drive; that afterwards he saw the old sheer boom up at the Cut-off at Catching Slough above the boom and the sheer that lays across the mouth of the Cut-off is reinforced by piling and piers right up to it; that the winter of 1909 and 1910 was when the boom was broken; that there was one old dolphin on the shore that was not in use; that witness re-planked all the other dolphins; that the old sheer-boom at the head of the Lower Boom was strengthened by adding sticks on each side of it and putting on chains and mortising in cross-pieces, and the swing-boom was built new; that the old sheer-boom was three sticks wide and that as strengthened it was five sticks wide and that the old sticks in it were small and the new ones ran larger, and that witness re-chained the old sheer-boom all over.

That at this point the plaintiffs interposed a general objection to all testimony in regard to the construction or re-building of the booms on the ground that the same is incompetent, irrelevant and immaterial, and not within any of the issue of the suit. Witness then further testified that he had put in what were known as cross-chains by boring through the out-

(Testimony of W. J. Ingram)

side-sticks and letting the chains go right across and up through underneath the boom and upon the outside, which strengthened the boom so that it could hardly break; that the old boom was not fastened in that manner with chains underneath and that the old sheer-boom would not have handled the logs for the year 1909 and 1910 and that a good many of the logs broke through that year; shortly before he went to work on the boom Mr. Bernitt had taken some sticks up the river and understood he was going to raft some logs for Mr. Gould; that when witness first came to the boom Mr. Willis Varney and a crew of possibly six or seven men were working there with a pile-driver and he continued working there after the logs were caught and they started rafting; that after looking it up the witness found the length of the old Creamery Boom to be about 1100 feet.

Upon re-cross examination witness testified that on the South side of the Lower Boom there was some new piling driven all along through it; that not very many hemlock piles were used in constructing the boom; that he would say the old piling was fir, and that in sawing them off he noticed one or two white cedar piles; that he had never had any experience with piling or timber in salt water until coming to work on this job, and that he had observed piling since; that the water about these booms is salt water, and he judged from the way he had seen some of these piling, if they last fifteen years they would be doing

(Testimony of W. J. Ingram)

well; that he had seen some piling in these booms that was apparently very old, but he had no means of knowing when they were driven; that they must have been driven longer than five years or the tops would not be rotten, and the only way he would have of judging as to whether they had been in ten, twelve or fifteen years would be from the condition of the tops; that he did not know as he was competent to testify what the life of the ordinary pile would be in that water; that he had repaired all of the booms around there and re-chained them, not taking off the chain and replacing it, but where they were old he would nail another chain alongside of it; that a good many of the sticks that went into the construction of the Lower Boom were water-logged; that he had been there in the summer time during the dry season and at low tide those boom-sticks would be out of water but would be in water once or twice a day with the tides; that he thought he had turned about twenty (20) of those boom-sticks adrift and the balance of them were in use when he quit working; that the sticks which the plaintiffs took away were ordinary rafting sticks that were just below the Creamery boom on the bank; that some one took some sticks away from above the Creamery but witness did not know who it was; that while witness was there the Creamery Boom was used for storing white cedar logs during the summer of 1909; that he rafted some of Gould's logs and some of Simpson's logs, but no pony Slough logs, and the boom

(Testimony of W. J. Ingram)

was not used for storing piling; that during the summer of 1909 the boom was used for storing white cedar logs from Pony Slough and South Slough; that the old sheer-boom that was placed opposite the Cut-off might have been placed there by the witness or some of his men, but he did not think it was there during the time he had charge of the boom; that witness started to make the extension on the Creamery Boom but didn't finish it, but after he started to make the extension there was no further use for the old sheer-boom; that he remembered seeing Mr. Bernitt with some sticks tied up to the shore as he was going by pretty well up the river, possibly eight or ten miles above the Creamery; that Mr. Bernitt had with him the "Relief", a gasoline boat and some boom-sticks, and the plaintiff at the time was coming down with the logs. That the logs were run in the river and the plaintiff was coming down with the rear; that the next time he saw Mr. Bernitt was when they were rafting out down below and he believed that they had some little conversation about Mr. Bernitt's boats doing better towing than the rest of them.

Witness further stated that in repairing the different booms he was employed by Smith-Powers Logging Company and that new piling was driven extending the Creamery Boom up to the Cut-off since witness left there; that witness stayed at the boom all winter and two of his crew stopped in town while the other three stopped in a shanty; that they

(Testimony of Alvin Smith)

stopped in Mr. Wittick's shanty for awhile until they made a new boom-shanty, the scow being located in the channel near the wharf at the Cooston landing.

Alvin Smith was then produced as a witness on behalf of the defendants and after being first duly sworn testified in substance as follows:

That he was forty-nine years old and operated a ranch on Coos River situated at the upper end of the Upper Boom here in question; that he lived at this place for twenty-five years and during that time went back and forth past the Creamery Boom two or three times a week; that he had been engaged in fishing on the River in the neighborhood of these booms during the time and was familiar with the booms; that he could not remember the exact date when the Creamery Boom was built but should judge it was twenty-five years ago, and that if there had been any extensive repairs thereto prior to 1909 and 1910 he would have noticed them, though he would not have noticed their putting in a pile or two; that there were no extensive improvements prior to that time and no noticeable or material changes in their appearance, but could notice that the piling in the Creamery Boom had rotted down nearly to high-water mark and the tops were off of some of them; that he had gone over the booms and counted the piling two days before in company with Mr. Powers, Mr. Ingram and another man; that he could tell

(Testimony of Alvin Smith)

new piling from old ones and that he found 159 old piles in the Upper Boom, going down as far as the Lower Boom including the piling on both sides of the river that could be considered to be in anywise in use in the boom; that there were others back on the shore that witness didn't count; that he counted above all that he could see including the piling opposite the Creamery upon the bank; that he counted 610 new piling in the Creamery Boom starting in from the line of his own land; that the old piling looked pretty rotten on top but he didn't notice the condition of the boom-sticks; that he counted the piling in the Lower Boom and found 121 old piling including the piling in the dolphins and 768 new piling; that he noticed the chains on this boom and that iron deteriorates very rapidly in water over there and that the old chains and cross-chains on the Lower Boom were rusted in two; that Mr. Powers took hold of one of the chains and twisted a link out of it, and that the rust on the chains that they claimed to be in there five years looked to be a quarter of an inch thick; witness here identified some of the rust as having been taken by him from one of the new chains, and the same was placed in evidence and marked "Defendant's Exhibit B".

Witness then testified that he was in no-wise related to C. A. Smith, or interested in the C. A. Smith Lumber & Manufacturing Company, or the Smith-Powers Logging Company, or related to any of the parties or companies connected with this suit, and

(Testimony of Alvin Smith)

that he had no prejudice for or against any of the parties to it that Mr. Powers and Mr. Bernitt had both asked him to see the condition of the boom and that he had no object either way in the suit.

Upon cross-examination the witness stated that when counting the piling in the Lower Boom neither Mr. Bernitt nor Mr. Wittick or anybody representing them was along; that in counting the piling they started in at Graveyard Point and went to the lower end of the boom; that there were about thirty-five or forty acres fenced in on the mud flats and they counted clear around those piling on both sides and on the end; that in beginning to count the piling in the Lower Boom they started in at the dolphin at the intersection of the South Channel of Coos River with the North Channel and counted the South or West side first, counting the dolphins; that they also counted the piling on the land side of the North channel; that there are three rows of piling, one on the land side, one in the center and one on the other side of the channel, and they counted them all; that they counted them clear down to the lower end to where they swing the boom; that there were 121 old piles; that he didn't count some piling that were farther back in the grass where that point goes back of where they are using the boom at the present time; that there was something like an elbow going in there and that witness thought it had probably been so long since it was built that it had filled in; that they counted down to the float

(Testimony of Alvin Smith)

in the Cooston Channel and below, and he didn't remember of seeing any other float there; that they didn't count all the piling on the left-hand side going down, that there were just a few piles that were away from the boom on the left hand side; that they counted all the old piling and noticed new piling driven in with the old piling on the right-hand edge of the channel but could not tell how much; that they counted the piling on the land side from the dolphin at the intersection of Coos River with the North Channel up toward the Creamery but could not tell how many piling there were in that particular place; that the piling between the upper dolphin and the Creamery were not included in the Lower Boom but in the Upper Boom, and that in counting the old piling in the Upper Boom they included piling on both sides of the river; that in the Creamery Boom he noticed some new piling driven in the old portion of the boom just opposite the Creamery, but just how many he could not state as he did not attempt to keep tract of the new piling that were in the old booms; that the biggest part of the new piling is included in the extensions; that some of the piling in the Upper Boom was right down so that it looked to be three or four feet above the water but he could not say whether the tides would go over them; that he lived about a mile and a quarter up the River from the upper end of the Lower Boom and he should judge about a mile from the upper end of the Old Creamery Boom; that he could see the upper end of the boom that had been driven

(Testimony of Alvin Smith)

to sheer logs off of McIntosh land, but from his house could not see the upper end of the old boom; that during the twenty-five or twenty-six years he had lived on the place he had been away at times for months and that they might have put piles into the boom or done one thing or another without his noticing, and that in fishing on the River he would have been apt to notice any extension work; that the piling and boom-sticks were on the east side of the river within a rod or two of witness' line but that he didn't think there were any old piling in there as it was all new work; that there were two old piles up at the point that he didn't count and there were some old piling above the Creamery that he didn't count, but that most of the piling that were counted were in use; that many of the new piling are in the extension work and there is a whole string of new piles upon the McIntosh side; that witness would judge there were thirty-five or forty acres enclosed in the Upper Boom and that they were mostly new piles; that witness had had a conversation with Mr. Bernitt a couple of months before, but that he didn't think he made any statement that the piling would last forever in that water, that it might last forever down in the dirt, but he didn't know whether he had made that statement or not.

Upon re-direct examination the witness further testified in substance, that in counting the piling he had left no gap between the Upper and Lower Boom; that when he got at the point where he left

(Testimony of Alvin Smith)

off counting them as of in the Upper Boom he began counting them as in the Lower Boom; that the sheer boom that runs along the edge of the McIntosh land serves to sheer the logs off of the land and sends them over into the boom, and before this sheer was placed in many logs used to get into the marsh.

Upon re-direct examination witness further testified that by new piling he meant work that the Smith-Powers people had done; that you could tell the old piling from the new piling at a long distance; that you could tell the difference between a pile that had been in ten or twenty years by the decay at the top and the moss on it underneath the water; that that was the way he judged the piling and he didn't think he made a mistake; that he could not say that he had seen pile drivers and crews repairing the boom nearly every year but he did know that Mr. Bernitt brought a pile-driver up to the Cut-off and drove some piling there; that in making the count they tried to count every pile that was in use and to classify them as new or old, and that a pile that had been in there three or four years they would call new.

Upon further re-direct examination witness testified that there were two very distinct classes of piles there, new ones and old ones; that the piles classed as old piles were so plainly old that anyone could see it, and the new piles so much newer than the old ones that anyone could see that; and that

(Testimony of Willis Varney)

the piles classed as new in the old boom and the piles classed as new in the new work looked to be alike.

Upon re-cross examination the witness further testified that the tops of some of the new piles had been cut off and also some of the tops of some of the old piles, and that when witness was there it was high water and he was guided entirely by the appearance above water, and that some of the old piles still had bark on them.

Whereupon and on July 22nd, 1912, Mr. Willis Varney was produced as a witness on behalf of the defendants and after being first duly sworn testified in substance as follows:

That he was thirty-seven years of age and a pile-driver foreman; that he was familiar with the cost and value of piling and of installing piling in Coos County and in this part of the United States and was familiar with boom-sticks and the cost and value thereof in this part of Oregon and the United States; that he had five years experience in the tidal waters of Coos Bay and fifteen years experience in the fresh water in Minnesota and during all that time he was engaged in pile-driving, doing boom work and repairing, and had worked on the Mississippi and Rum River Boom Company and the Itaska Logging Company as laborer and boom foreman and as a contractor on his own account on this same class of work; that he had been on Coos Bay five years and during that time had been engaged in pile driving and boom

(Testimony of Willis Varney)

work and was familiar with the booms in controversy in this suit; that he first saw them in 1907 and then went over them with Mr. Powers with the view of repairing them; that in 1908 he took charge of the boom for the Smith-Powers Logging Company, he thought in the month of August; that no one else was in charge of them at the time and he didn't see either of the plaintiffs at the boom or doing anything there; that he saw them going by but that was all; that he remained in charge of the boom continuously from August until Christmas and then turned them over to William Ingram; that he had a crew of ten to fifteen men and there were no logs in the boom when he started but some came in along in December, not long before he left; that during that time they were engaged in building new booms and repairing the old one; that in 1907 when he went over the boom with Mr. Powers he observed its condition and that it was badly dilapidated, the majority of the piling rotten and decayed and most of the boom-sticks badly decayed and some of them would not float at all, that the majority of them were in bad condition and most of the boom-chains badly rusted; that the sheer-boom at the head of the Slough broke on the first freshet, and the sheer booms were old and worn out; that they were small and pretty well water-logged and the fastenings and cross-chains were in the same condition; that during that summer and fall he built a new boom from the head of the Cut-off to the foot of the Old Boom splitting the channel, blew out the old dolphins,—he thought four of them,—

(Testimony of Willis Varney)

and built new dolphins and built a new boom down the entire length of the channel, splitting the channel; that he drove a few new piling along the South shore and a few along the other shore outside of the boom and drove all the piling below the sorting works to tie rafts to; that he didn't take out any of the old piling along the shore except what fell over when they ran against it, when the pile driver ran against it; that the old piling and boom-sticks along the South side of the Lower Boom were in bad condition and he fixed up the old ones and put in some new ones and put on quite a few new chains; that some of the old sticks were too rotten to hold the chains and he re-placed them with new ones; that the boom on the North side of the channel was broken up and the sticks pulled apart and witness drove a few new piling along that shore, put in some new boom-sticks and put in quite a few new chains; that the boom on this shore was in about the same condition as on the South shore; that the boom-sticks were medium size and from their appearance had been in the water quite a few years; that the new material witness placed in the boom was procured from the mill; that they were tearing up the boom at the mill and building it new and witness procured boom-sticks from there including the chain; that there was quite a large raft of it secured from there. Witness further testified that he also looked over the Old Creamery Boom and took charge of the same; that it was in a little better condition on the outside than the Lower Boom but the inside was in a dilapidated condition and

(Testimony of Willis Varney)

witness put some new piling in this boom along the channel and did some repairing to the shore side of the boom, driving some piling across a little channel there, re-chained the boom, put in a few new sticks, went all over it and repaired it; that the old sheer boom at the head of the Creamery Boom was dilapidated and the chains in it badly rusted, the logs were old and small and witness reinforced it and put it up in the Cut-off, not using it any more for a sheer; that this Cut-off is a channel that runs from Coos River over to Catching Slough and in order to keep logs in the river a boom was placed across the mouth of the Cut-off; that the witness drove new piling across the mouth of the Cut-off against the old sheer, and the piling back of it doesn't have to be held fast like a sheer-boom; that the old piling that was formerly at the mouth of the Cut-off waked out in the freshet; that from the head of the Old Creamery Boom to the Cut-off witness put in new booms and drove piling on the North shore of Coos River across from the Creamery Boom and from the Creamery up for about a mile and put new boom-sticks along that shore and also built a new sheer-boom at the head of the Creamery Boom; that witness was in charge of the boom in the fall of 1908 when the logs first came down; that the logs were caught by the Smith-Powers Logging Company, and Mr. Bernitt was there with his boat after the logs came in.

Upon cross examination the witness testified in substance that the logs were caught by the employees

(Testimony of Willis Varney)

of the Smith-Powers Logging Company and that he had been through two or three freshets at the booms, and that the logs usually come in strong on a high freshet; that he could not state how many piling he had driven in the middle of the North Channel nor for what distance they extended, nor could he state definitely how many piling he drove on the sides or how many boom-sticks he turned adrift, or how many chains he renewed, but that they worked there off and on for about a year and a half; that he kept no record of the boom-sticks taken out and they might or might not exceed fifteen and would run anywhere from forty to sixty feet in length and possibly longer; that all of the sticks were in poor shape and the piles were very rotten, so rotten that in tying the pile driver to them they would pull over; that he had seen several of them pull over that way; that the condition the boom was in was one that was brought on gradually and it would take quite a term of years to develop the rotten condition it was in; that he couldn't say how many chains he put in but probably 100, some in new sticks and some in old; that this refers entirely to the repair work on the Old Boom, except that they built a new project down at this end; that the sticks were taken over there probably in August or September and the Old Boom was still being used; that witness was working for the Smith-Powers Logging Company and had been working for them ever since 1906, but had no interest in the corporation; that there would be forty or fifty sticks so rotten that they would not hold chains but

(Testimony of Willis Varney)

they were supposed to be in use in the boom and were connected with other sticks that were connected with piling; that the first freshet witness saw there was in 1908 and the sheer-boom at the upper end of the Lower Boom then broke in the middle; that witness wasn't positive of the date and it might have been the year following; that the witness saw this boom break and either Mr. Ingram or himself was in charge of the boom at the time; that he thought they blew out four dolphins in the Lower channel, four or five, and they blew out one at the head of the Creamery Boom and he could not remember how much piling they blew out of the Creamery Boom; that they also repaired the old dolphins in the Lower Boom and drove twelve or thirteen piling in the first one and six or seven in the next one and in each of the other two; that he built a new dolphin for the gate to swing against and that there is an old one above next to the shore; that in booms of this character repairs should be made every year; that the stuff in the Cut-off all went out twice and it required pretty good material to hold the logs in the North Channel and also in the Creamery Boom; that the last time witness had anything to do with the booms was driving some piling on the North shore above the Creamery in the preceeding Summer of 1911 and that the last time he had anything to do with the Lower Boom was two years before, and his memory wasn't distinct as to the details; that he saw Mr. Bernitt over there previous to the freshet in 1908 moving some rafting sticks; that witness was

(Testimony of Willis Varney)

there on the 5th or 6th of January, 1909, and that some logs were caught outside the boom at the time of the freshet, that he could not say definitely the date; that the booms at the time he turned them over to Mr. Ingram were full of logs; that the work of putting in the sticks, chains, etc., most of it was done in 1908 and the boom-sticks were turned adrift at intervals when he was over there repairing the boom; that he drove piling there at other times later than 1908 and some of the piling were broken off by the pile-driver in 1908 and some afterwards; that they broke off down at low water mark and appeared to be decayed; that the water over there is salt in the summer time but is fresh water when the freshet is up; that he drove some piles in the channel at the Creamery for the purpose of strengthening the boom; that he had no conversation with Mr. Bernitt in which he stated that the work didn't strengthen the boom and he didn't see the use of it, but it was his orders from the office; that never anything of that kind transpired.

Upon re-direct examination the witness further testified in substance that in strengthening the boom and repairing it he went in a measure on his own judgment and also under the orders of Mr. Powers; that Mr. Powers told the witness to make the boom so it would hold logs and he put the piling where he thought it was needed. That he used a steam pile-driver and got material from the old Mill Boom at Bay City; that he built a new boom there replacing

(Testimony of Willis Varney)

the old one and took the material from the old boom over to the Coos River Boom; that he had observed the life of piling in fresh and salt water and that the piling in waters as salty as those at the boom did not last as long as in fresh water.

Upon re-cross examination the witness stated that in the Eastern states a Norway pile would last about ten or twelve years in fresh water, but that witness could not say what the life of a pile in salt water was, that he had no actual knowledge of it, but it was his opinion from his experience for the last five years on Coos Bay; that he had seen sound piling driven around the Bay within five years that had deteriorated nearly as much in that time as it would in twelve years in the East; that he referred to fir and hemlock piling driven in the C. A. Smith Mill Boom; that old growth piling decays quicker than sapling, and he had noticed both of them decaying in five years, that it began decaying at the top and worked down, but he couldn't say how much.

Witness further testified that the boom-sticks taken over there by him were used in strengthening the old boom and some of them were put in the center of the North Channel; that the Lower Boom was approximately a mile long and these sticks were all lengths, anywhere from forty to seventy feet; at the Bay City Boom from which these sticks were taken witness would say was about 1200 feet long; that there was two sticks laid all around it and there was another inside boom which he tore out that made

(Testimony of P. L. Phelan)

it double, but all of these were not taken over to the Coos River Boom.

Upon re-direct examination witness testified that the material taken from the Old Bay City Boom was some of it left out and new put in its place and the resulting boom-sticks, new and old, were taken over to the Coos River Boom; that some of the large sticks were placed down the center of the channel but the bulk of them were placed on the shore in the Old Boom; that the best piling to be used on Coos Bay is white cedar and the piling used in the repairs of the Coos River Boom was fir and cedar, or fir most of it, or possibly about a stand-off; that he did not know what the old piling was in the old boom and thought most of the old piling in the Boom when he went there was fir and that you could easily tell the character of an old pile by cutting it.

Upon re-cross examination witness testified that the boom-sticks taken over from the mill were old but sound, although they had been in the water some time and were of better quality than the sticks in the Old Coos River Boom.

Thereupon and on July 30th 1912, Mr. P. L. Phelan was produced as a witness on behalf of the defendants and after being first duly sworn testified in substance as follows:

That he was fifty-one years of age, by occupation a lumberman and had resided in Coos County since

(Testimony of P. L. Phelan)

February 1893; that he came to Coos Bay as Manager for E. B. Dean & Company who then had a saw mill, timber land and boom privileges here; that C. H. Merchant was in charge of the business when witness came here and stayed until the first of the March following, showing witness what he thought was necessary about the business and thereafter witness had charge of it until December 1896; that Mr. Merchant was appointed Receiver in the September or October of that year preceding and that the last three or four months witness was practically under Mr. Merchant, as Receiver but that from March 1st, 1893, until he was appointed Receiver in 1896, Mr. Merchant had no interest, say or management in the E. B. Dean & Company, which consisted of the partnership of E. B. Dean and David Wilcox; that at the time witness took charge in 1893 he looked over the booms operated by the company, which are the same booms in controversy here; that Mr. Merchant informed the witness that Mr. Bernitt and another North Bend man named Anderson had a working interest in the boom and rafted to North Bend and North Bend gave them a bit a thousand and sent Dean & Company a bit a thousand, and for the logs they delivered to E. B. Dean & Company they got 35 cents a thousand for rafting and the Coos River Boom was credited with the boomage. Witness further testified as follows:

“And Mr. Merchant told me that he had had some dispute with E. B. Dean and Wilcox about giving

(Testimony of P. L. Phelan)

Anderson this working interest in the booms and he said that Dean always objected to him doing this. He told me that he did it for the reason that he hadn't time to look after it himself, but he had given them the working interest. Every freshet he had to go over there to run out logs and drift, every year, and he gave the rafters an interest with the understanding that they would do this and take care of the boom, and they were to get thirty-five cents a thousand on all the logs that passed through the boom. I told Mr. Merchant, I said, supposing I don't get along with the rafters and have to put some-one else on the rafting, and he says whenever they stop rafting their interests cease, they have a working interest, and later on when they were talking of selling the property, Graham was trying to get Spreckels to buy it—

Mr. DOUGLAS: We move that the answer be stricken out for the reason that the same is not responsive to the question and is hear-say evidence, incompetent, irrelevant and immaterial.

Q. To ahead with your answer.

A. I went to Mr. Merchant at this time again and talked about the boom, I said if Graham buys, how about the boom over there, the Coos River Boom. Well, he said the rafters never had anything but a working interest and Dean & Company always have owned the property, and when the property is sold if the rafters want to raft they will have to make arrangements with the other parties, their interests cease

(Testimony of P. L. Phelan)

when the property is sold. I think that was the last conversation I ever had.

Mr. DOUGLAS: We move that the entire answer be stricken out for the reason that the same is not responsive to the question and that the same is hearsay evidence and is incompetent irrelevant and immaterial".

Witness testified that during the time he was Manager for E. B. Dean & Company the logs that were delivered to E. B. Dean & Company he had scaled and credited the rafters with thirty-five cents and the Coos River Boom with twenty-five cents; that he did the scaling and made a memorandum on the copy of the scale: "Bernitt rafting 35, B. Coos River 25"; that the thirty-five cents was to pay for the labor and rafting the logs from the Boom over to the mill; that the twenty-five cents was credited to the Coos River Boom; that the rafters did the repairing to the boom and when they got through put in a bill for their time, which would be charged to the boom and credited to them, and the materials, such as boom chains, piles and things of that nature would be charged to the booms, and that absorbed the twenty-five cents and may be a little more than that; that Dean & Company purchased the boom-chains, piling, etc, and charged it to the boom; that he thought the rafters furnished most of the lines, anchors, etc; that according to his recollection during the time he was there the boom was in debt, that is the twenty-five cents that was credited for the logs that went

(Testimony of P. L. Phelan)

to Dean & Company didn't take care of the charges; that for the logs that went to the other mills or other places on the Bay the rafters received $12\frac{1}{2}$ cents and the mills remitted to Dean & Company $12\frac{1}{2}$ cents; that the settlements were made independently, the rafters and Dean & Company each collected their $12\frac{1}{2}$ cents; that the rafters looked after the booms as well as deliver the logs and that in handling the accounts the $12\frac{1}{2}$ cents that went to Dean & Company was credited for their half interest in the logs that passed through the boom; that during the time he was there they repaired the dolphin, put in one little dolphin, he thought, and repaired the other; that the sheer went out and was renewed and some new chains were put in, and piling in different places, and the boom was kept patched up to make it hold logs; that witness went over the boom and examined it during February, or some time during the first winter during February and examined it carefully and again some time after the water was down low, some time in July; that the boom wasn't kept up, was depreciating all the time, getting a little worse and a little worse, and not only on account of the boom-sticks rotting out faster than they were replaced, and the chains, but the boom itself was filling up rapidly on account of drift, and that witness' idea was that if something wasn't done that in a few years it would fill up and be mud flat; that the heavy drift would lodge, and it kept shoaling up so that drift accumulated and lots of it they couldn't get out; that the policy was to make just what repairs they

(Testimony of P. L. Phelan)

were compelled to to save the logs; that they generally bought second-hand anchor chains which made fairly good boom-chains, but could always be had cheaper than new chains; that they would not last as long as new anchor chain but was cheaper and would last nearly as long as ordinary small link chain; that the understanding with regard to the way that the boom was to be operated, as the matter was turned over to the witness was that the rafters had all the rights to do the rafting as long as they did things to the satisfaction of the company; that the rafting all went to Bernitt and the North Bend outfit; that the rafting-season varied, but that some times the logs might come down in September, but generally in November, December, January and February, and up to June; that the witness' recollection was that they rafted all the logs out before June.

Upon cross-examination the witness further testified in substance that he had been testifying with regard to the portion of the boom during the time he was manager, being something over three years from March 1893, to the fall of 1896; that the mills were not both running full time all the time, and sometimes they were both shut down; that most of the logs were procured from Sumner and some from along the railroad, and some logs of course from Coos River, but a very small proportion of the logs came through those booms, although there was no year that there was not a million feet going through; that it averaged about a million feet a year for the

(Testimony of P. L. Phelan)

three years; that the rafters would report whenever anything needed attending to and the mill company would ask what material they wanted and got it and the rafters would repair the boom; that witness didn't always take the rafters statements, but once or twice went over with Mr. Bernitt and looked it over; that witness went over the boom a couple of times the first year and was over the boom perhaps half a dozen times after that, not particularly to inspect it but to see what logs were there; that witness' understanding from Mr. Merchant was that if he couldn't get along with the rafters he was at liberty to get somebody else to handle the boom; that witness could not find out from the books kept prior to the time he went there what the arrangement was and this was the reason why he talked with Mr. Merchant; that he could not find that the rafters had any interest in the booms from the books the company was using, but never went back and examined the old books; that he didn't remember of any charge ever being made to Mr. Bernitt or the others for any deficiency during the years he was there, although there might have been; that witness didn't change any of those arrangements and the rafters collected their 12½ cents themselves and Mr. Bernitt and the others collected theirs; that about once a year the mill companies would send Dean & Company a check showing the credit; that he didn't remember of ever sending Mr. Bernitt a statement although he remembered Mr. Bernitt asking several times about how the boom stood, and witness would then look at the account; that

(Testimony of W. F. Squire)

there wasn't any understanding about any credit that might be shown on the boom account, but witness' idea was that if there was any surplus earnings they should use them in improving and maintaining the boom as it needed a lot of improvements and if they ever had the money on hand he thought this is what would have been done with it; that witness' understanding was that the boom wasn't half taken care of and there wasn't earnings enough to take care of it, but of course if the charge for what logs went to the other mills had gone through the account mentioned it would have made a better showing; that the books used by the company didn't show that E. B. Dean & Company had an interest in the booms, or who owned the Coos River booms any more than that the land was in the name of E. B. Dean & Company.

Upon re-direct examination the witness further testified in substance that the books showed that E. B. Dean & Company owned the land and paid the taxes and these taxes were not charged to the boom and didn't appear anywhere in the Coos River Boom account.

W. F. Squire was then produced as a witness on behalf of the defendant and after being duly sworn testified in substance as follows;:

That he was forty-three years of age, a merchant residing at Bunker Hill; that he had lived in Coos County nine years, coming to Coos County in 1903

(Testimony of W. F. Squire)

as book-keeper for the Dean Lumber Company, which position he held until he became Manager of the Company in 1905; that he acted as Manager until the business was turned over to C. A. Smith about the first of January 1907; that he had complete charge of the books of the company in Coos County and the books kept by him for the Dean Lumber Company were turned over to its successor; that he didn't know what became of them, but part of them were sent to the company in San Francisco; that witness shipped them to Mr. Dillman when the business was closed up here, all the current books; that W. T. Merchant was Manager during the time witness was book-keeper and that during that time there was a record in the books with regard to the account called Coos River Boom account; that the expenses of the boom were charged to that account and witness thought that when he came here he found that all the revenues derived from the boom were credited to the Boom account; that if he remembered right the charge for boomage was twenty-five cents a thousand; that if they were delivered to Dean & Company that was the amount charged and if they were delivered to any other concern, Dean & Company only collected half of the amount and those items went into the boom account; that the 12½ cents collected or credited to that account from other companies belonged to the Dean Company and from time to time the account was closed up and turned into the proper accounts; that witness changed the books a little and kept a separate account that he called "Coos River

(Testimony of W. F. Squire)

Boomage Account" but still continued the old Coos River Boom account; that the charges to the latter account were of the same character as formerly and consisted of expenses for repairs and supplies, rope, chain and other material that was called for, together with the charges for labor; that while he was book-keeper, witness simply did as the Manager told him, but after he became Manager he endeavored to find out what arrangement the boom was being operated under; and over the objection of plaintiffs that the evidence was incompetent, irrelevant and immaterial, witness stated that he looked up the records and papers and files of the company, that he inquired of Captain Bernitt and gathered what information he could from other people who had been connected with the concern, and from the records he found that there was a lease on part of the ground on which the boom was built; that there was no permit from the United States Government for using the channel and that Captain Bernitt and Mr. Wittick had been operating the boom under some agreement or arrangement that witness believed began some nineteen years before, and that there was no written agreement in the possession of the company, and witness could not learn that there ever had been one; that the lease from Holland, who owned some of the land over there, went to E. B. Dean and Company and that as near as witness could learn from conversations and from the books the arrangement with the plaintiffs seemed to be that they had charge of the boom, collected the logs and looked after the logs,

(Testimony of W. F. Squire)

and after they were caught they attended to the repairing and had the exclusive privilege of doing the rafting from the boom; that they made their own collections and shared a half of the proceeds derived from the boomage, which was credited to them whenever the logs came to the Dean Lumber Company, or which they collected themselves when the logs went to another company; the rafting was always credited direct to them and a half of the boomage was credited direct to Bernitt and Wittick under separate accounts; but the other half was credited to the Coos River Boomage account after witness had separated it, but that formerly it was credited to the Coos River Boom account, and once a year, usually when the books were closed, it was taken out of the Coos River Boom account and credited to other accounts, witness presumed to Loss and Gain or whatever the book-keeper might call it; that under the system which witness inaugurated the Coos River Boom account showed merely the charge accounts, the expenses of the boom; that after all those expenses were charged to Captain Bernitt and Wittick, and the other half the company assumed, that it was charged to the general expense account; that witness had talked with Captain Bernitt and with W. T. Merchant, and he thought with Mr. Merchant, and he talked with the Secretary of the company, Mr. Moulton; that he also talked to Mr. Dillman about the boom but didn't remember of talking to him about the details and management of it; that he looked over the booms himself, just took

(Testimony of W. F. Squire)

a view of them a couple of times a year or may be oftener as he happened to be passing by, and once or twice made a special trip to look at the booms; that they were badly dilapidated and that he talked with Mr. Bernitt in regard to repairing them and that the last year before the company sold out he had considerable talk with Mr. Bernitt about the boom and they came to the conclusion that they would not spend any more money than was absolutely necessary to keep the booms in sufficient repair to work for another season; that while witness was Manager the repairs were no more extensive than were necessary to operate the booms, and there were no extensions or improvements that he knew of; that witness often conferred with Mr. Bernitt about the course to pursue as there was apparently a crisis coming as to whether they could use the booms at all or not and they were being forced by other parties who were kicking; that the booms occupied the channel and there seemed to be no permit from the Government; that they seemed to be using it by common consent and frequently people were objecting because the channel was being blocked, and they were interfering with the boom; that of course the people thought they were over-stepping their rights in using the channel and they didn't suppose they could obtain a permit from the Government to use the booms that way, and that it was a matter of just getting along as well as they could until they were compelled to do something different; that this was the talk between the witness and Mr. Bernitt and that he

(Testimony of W. F. Squire)

thought they agreed upon this being the situation; that Mr. Devers was objecting to their using the channel as he had purchased the Holland property which lies north and east of and abutts upon the channel; that Mr. Holland, through his sons and his attorney, demanded a release of the lease that would satisfy the prospective purchaser, Mr. Devers, and witness talked it over with Mr. Bernitt and they concluded that it would be better to comply with witness' request at least for a while and accordingly the Holland lease was cancelled; that the Dean Lumber Company surrendered possession of this property to the C. A. Smith Lumber Company; that witness was present at the time and that Mr. C. F. Dillman of Sacramento was then the President and chief stock-holder of the Dean Lumber Company; that witness received instructions from the Dean Lumber Company to turn the property over to C. A. Smith which he did; that witness thought he made a statement to the representative of Mr. Smith regarding the rights and interests in the boom but didn't state that Mr. Bernitt owned or claimed a half interest therein; that they never claimed to the witness that they owned a half interest in the boom.

Witness further testified that along about the time the question with regard to the Holland lease came up Captain Bernitt used to report to the witness that he would find the booms open and molested and the logs were allowed to get out.

(Testimony of W. F. Squire)

Upon Cross examination the witness further testified in substance that he didn't remember that the ownership of the boom had been discussed between Mr. Bernitt and Wittick and himself at any time. Witness then testified regarding the transfer to Mr. Smith as follows: "I was present—I mean to say that I was here at this place, and I had instructions from Mr. Dillman that he had disposed of his entire interests in Coos County to Mr. C. A. Smith, and that in due time I would hear from Mr. Smith, and I should turn over to him everything here as he desired. Shortly afterwards I had a telegram and later a letter from Mr. Smith saying that he would send Mr. Oren here, and that I should turn over everything he had purchased to him. When Mr. Oren arrived here I did so, and I simply handed him what papers belonged to the company, contracts and every manner of instrument and thing that went with the sale. Mr. Smith came here very shortly after Mr. Oren's arrival and we wound up the entire transfer while he was here, and I stepped out of the office"

Witness further testified that he thought Mr. Oren and he were up at the boom and that he showed him the booms; that witness told them that those were the Coos River Booms and that they had abstracts and maps, and witness indicated to him what they were; that they visited the boom within a few days after Mr. Oren's arrival; that they went over all the property here in town upon the day of his arrival, which witness thought was some time in March, 1907;

(Testimony of W. F. Squire)

that at that time they may have been rafting logs from the boom, but it wasn't the season when they were catching logs; that witness didn't remember whether there were then logs in the boom or not, but that they went to both of the booms although they didn't go the entire length of them at that time; that at the time witness started to keep the books there were credits made to the boom account from logs going to other mills and his impression was that the price was twenty-five cents a thousand and that in case the logs went to other mills than the Dean mill the charge would be $12\frac{1}{2}$ cents a thousand and it would be the same credit if the logs went to the Dean Lumber Company's mill, the other $12\frac{1}{2}$ cents would go to the credit of Captain Bernitt and Wittick; that from his understanding Mr. Bernitt and Mr. Wittick shared in the expense of keeping up the boom and that once a year it was divided up and cleaned off the books; that once a year they divided the cost of maintaining the boom and the Dean Lumber Company assumed half and the plaintiffs the other half; that after he became Manager, witness had a separate account called Boomage Account and to that account credited the company's share of the boomage and he made the Coos River Boom account merely an expense account, which he divided up once a year, as stated, and charged off the books; that that it was about five years since witness remembered seeing this account; that he ceased to keep this account December, 1906, and after the succeeding January conducted the business for C.

(Testimony of W. F. Squire)

A. Smith; that during the time he was book-keeper and Manager a great many hundreds of logs were caught in the boom each season, but that he didn't recollect of any considerable number going away on account of the weak and dilapidated condition of the boom; that naturally during the freshet some logs go away but not of any consequence and that Captain Bernitt attended to the repairing of the booms and that he believed they used a pile driver once.

On re-direct examination the witness testified, over plaintiffs' objection that he wasn't qualified so to do, that the boom had been built for some twenty years, but Mr. Smith bought it and of course it had seen its day at that time; that when he was appointed Manager for the Dean Company he endeavored to learn exactly where everything stood and made a special inquiry in regard to the way the boom was managed and handled; that he looked up the records, asked Captain Bernitt, W. T. Merchant, C. H. Merchant and everybody concerned or who had been concerned and, over plaintiff's objection that the same wasn't proper re-direct examination, that it called for the conclusion of the witness, was incompetent, irrelevant and immaterial, and that the witness should state what was told him, or what the result of his examination was, and not all in one answer, the witness testified: "Well I learned from Captain Bernitt that he and some partners it seems to me there was at the beginning that had built the

(Testimony of W. F. Squire)

boom, that the Dean Lumber Company had furnished the material and that they had an agreement that they had the exclusive use of the boom. I should have said the Dean Lumber Company furnished the material which afterwards he and his partners shared half of the costs of it,—some years afterwards that was paid,—and that they were to have the exclusive privilege of using the boom for booming and rafting logs from Coos River, and that agreement was made it seems at the time the boom was first built and still continued the same during the time I had anything to do with it, as near as I understand it”.

Witness further stated that he had several conversations with plaintiff Bernitt and that the foregoing was the substance of what he stated; that the main value of the agreement to Captain Bernitt and his partners was claimed to be that they were to have the exclusive privilege of using the boom for booming and rafting the logs therefrom and all the logs that were caught in the boom and came out of Coos River; that after they were caught in the boom they were to have the right of taking them to the Dean mill or delivering the logs where-ever they wished them to go.

Upon re-cross examination the witness further testified that this arrangement applied to logs caught in the boom and logs that were rafted and stored there, but that there was no agreement that the plain-

(Testimony of C. W. Davis)

tiff Bernitt and his partner were to do the rafting outside of the logs that came through the boom.

Whereupon on August 1st, 1912, C. W. Davis was called as a witness on behalf of the defendants, and after being first duly sworn, testified in substance, as follows:

That he was forty-three years of age, was a riverman and had been engaged as a riverman around logs and booms for twenty-two or twenty-three years; that he was an employee of the defendant Smith-Powers Logging Company and had looked over the Coos River Booms; that he was working on the booms the winter before and had gone over and looked over the booms in the fore part of the preceding July; that at the time he made a memorandum there on the boom and that from his experience he could tell a pile that had been driven quite a number of years from a pile that has been driven a year or two, just from the appearance of it, and could judge whether a pile was sufficiently sound to be useful or not; that at the time he examined the boom in July he could tell from the looks of the boom what piles in it had been driven for a good many years and what had been driven within the last few years; that he went over both booms carefully and found 159 old piles in the Creamery Boom not including some old piles on the mud flats back of the booms that didn't touch it; that this count included the old piling that was in or apparently of some use to the boom; that he

(Testimony of C. W. Davis)

then counted 610 new piling in the Creamery Boom; that very little of the boom-logs and chains were old at that time and what there was old had been strengthened with new cross-pieces; that he took some time to inspect and go over the Lower Boom and included in the Lower Boom everything below the Creamery Boom from the dolphins on down; that he included in his count of the Lower Boom everything that wasn't included as a part of the Upper Boom and he counted 121 old piles in use in the Lower Boom; that there were some old piles there back of the booms and a few on both sides that he didn't count; that he counted 768 new piles in use in the Lower Boom and that the sheer booms there in use were mostly new; that there were a few old booms that had been reinforced with new chains and also with logs on the outside of them to strengthen them.

Upon cross-examination the witness further testified in substance that in counting new piles, new boom-sticks and new chains he had included all that in his opinion had been renewed within the past four or five years; that he counted these while going along in a boat but didn't get out on the boom-sticks; that the boat didn't go fast but stopped at every different point, though it didn't stop at every pile or every boom-stick; that in making the count he carried a certain amount in his head and that at the time of making the count it was about half tide, between two and six o'clock in the afternoon; that the piling was mostly cedar and the boom-sticks were some

(Testimony of C. W. Davis)

spruce, some fir and some cedar; that prior to his experience of two and a half months the winter previous and his experience since the succeeding June the witness had never had any experience with handling logs and piling in salt water; that up there at the booms he didn't think there was any great difference above the water in the appearance of a pile driven in salt water and one driven in fresh water, and that before coming here his experience had been on the Mississippi and Missouri Rivers and in fresh water entirely; that in counting the piles in the Lower Boom he had counted both sides at the same time and that there was nothing in the center of the channel; that in the Lower Boom there are three rows of piling on one side and one on the other; that there are three rows of piling making two pockets on the left-hand side of the channel as you go down stream and on the other side there is no pocket at all, only the boom to keep the logs from going on the mud-flats; that on the land side there is a row of piling driven along the mud flat, both old and new, and all of these that touched the boom were counted, including piling that was simply kept there to keep the logs from floating over on the mud-flats; that there was some piling there that he didn't count; that there was a row of piling all the way down on both sides of the river but that he only made 121 old piles in it in all; that while witness was at the boom the winter before quite a drive of logs came down, on about the 20th of February and that the channel at the Lower Boom at that time was full of logs.

(Testimony of C. W. Davis)

Upon re-direct examination witness testified that he meant that there was a row of piling about midway in the Cooston Channel or part of the distance; that they didn't count all the logs that touched the boom or a pile that was just touching the boom or lying there, but they counted anything that would be of any use to hold boom-chains or that lay close enough to be of any use; that in testifying that the piles were mostly cedar he referred to the new piling, but that unless you tested the old piling with an ax he didn't think you could tell what it was; that in counting the piling the boat went very slow and stopped at different points and that they took all the afternoon from two to six o'clock to look it over; that they drifted along slowly from one point to another and counted the piling to some certain point ahead where they would check up; that he was accustomed to counting logs and such things, had done considerable of it in his time and that he counted these piling as carefully as possible and was satisfied that the count was fairly accurate.

Upon re-cross examination the witness further testified that he didn't think he would be able to tell the outline of the old boom before the Smith-Powers people built the new boom; that he would if he were there on the ground and that in giving the count of the piling he had included all the extensions and was giving the total count of all the piling and sticks as they entered into the boom at the time of testifying; that in counting the piling in the dolphin they stopped at each one separately.

(Testimony of Robert Kruger)

Robert Kruger was then called as a witness on behalf of the defendant and after being first duly sworn testified in substance as follows:

That he was a resident of Marshfield, fifty-five years of age and his principal occupation had been rafting on Coos Bay, where he had lived for about thirty years; that he was familiar with the booms in question and had been ever since he came to the Bay; that at one time he had a share in the booms, in the year 1890; that he purchased this share from John Mattson including half the rafting gear; that Mattson just sold him the rafting gear and the right that nobody else could go in the boom; that he sold him the right to raft the logs out of the Coos River Boom when the logs came down on the freshet; that he thought there was a written bill of sale but didn't know what had become of it,—that he could not find it and didn't have it, and didn't know where it was, but that Joe Bennett might have had it as he made out the papers. Witness further testified over the objection of the plaintiffs that it wasn't the best evidence, that in the purchase he secured about six sets of boom-sticks, two boats, a rafting scow, three or four anchors, a set of spare chairs, sculling oars, and everything that belonged to the rafting outfit, pike poles, pieves, etc., and paid \$500.00 therefor; that there are fourteen sticks to the set and they are all chained together; that three-quarter inch chain cost \$45.00 a set and seven-eighths inch chain cost more; that the boats rigged up for work cost about

(Testimony of Robert Kruger)

\$150.00; that the boat costs \$100.00 and the freight and fixing it up cost \$50.00 more; that a rafting scow from \$250.00 to \$300.00 and at that time rope was twenty cents a pound, and they had to have considerable rope; that in his purchase he got a complete rafting out-fit, ropes, chains, etc; that Mattson didn't claim he was selling any interest in any partnership with Merchant or with the Dean Lumber Company; that he sold the rafting gear and the rafting gear belonged to the boom, and witness had the exclusive right to raft; that he said he was getting thirty-five cents for rafting and $12\frac{1}{2}$ cents for catching and $12\frac{1}{2}$ cents went to E. B. Dean & Company; that there was 25 cents all together for catching; that witness kept his interest for eight or nine months and then sold to John Hillstrom for \$1500.00; that Hillstrom understood what there was, the charges for rafting, catching, etc; that that year the Porter Mill started up, lots of camps above tide-water and lots of logs came down; that witness sold some time in September or October and there was then lots of work in sight for the next season; that at the time of the sale a bill of sale was made out by Joe Bennett, who made the remark when he made the bill of sale: "You fellows are buying and selling and you don't know what you are buying and you boys got nothing to show for it"; that he made a bill of sale but that they had no black and white interest in the boom and that Hillstrom answered Mr. Bernitt that he bought it in the same condition that he bought it from Mattson; that witness told Hillstrom that the

(Testimony of Robert Kruger)

gear belonged to the boom but that he didn't have anything to show that he had an interest in the boom, that neither he nor Hilstrom consulted Dean or Merchant or anybody about it; that after that witness rafted around the Bay but never rafted any logs from Coos River Boom; that he rafted out of Coos River right along and went right by the boom and saw it a great deal; that some repairing was done on the boom once in a while, chains renewed, cross-pieces and some piling driven once in a while, but very few; that the boom broke a couple of times in freshets and they lost some logs out of the boom; that witness knew this because he picked up some of the logs himself; that the year before witness bought a dolphin gave way and the sheer-boom drifted on the island; that after he sold out witness had picked up logs on the mud flat that came out of Coos River that were intended to be caught in the boom; that he took some of the logs to Simpson's mill and some to E. B. Dean & Company's mill, and each party paid for them individually; that witness had done some towing once in a while for Mr. Powers, brought some booms over and piling for fixing the boom; that he saw the boom in 1907 and 1908 when Mr. Powers took charge of it and at that time the boom wasn't in very good condition; that they put cross-planking on to strengthen it, and chains, and once in a while drove in a pile whenever necessary; that the upper sheer-boom to witness' notion was all right and they had no sheer-boom on the lower end; that the Lower Boom was old and whenever they would get more

(Testimony of Robert Kruger)

logs than the pockets would hold they closed up the channel; that these logs and piling were as old as the boom but they were keeping it in repair once in a while; that the Smith-Powers people drove new piling, put boom-sticks on and made pockets; that they blew out some old piling and put in new.

Upon cross examination the witness further testified in substance, that the scow was in good condition at the time he purchased it and the boats were in good condition; that the chains were good as they had no accident with the rafts; that Alfred Haglund was in partnership with witness and that at that time Bernitt had a quarter and Haglund and the witness a quarter; that Bertitt had his own gear in which witness had no interest; that when witness came to the Bay they were building the Lower Boom; that he remembered because George Wulff spoke of it at the time and was working over there and witness thought it was in 1880 or 1881; that witness bought of Mattson sometime in the Spring; that he couldn't remember what was the wording of the bill of sale but that Mattson sold him the rafting gear, and that he would not answer the question as to what was in the bill of sale; that he picked up considerable logs on the mud flat that should have gone through the booms; that he could not say what years they were as he kept no record of it, but that he had been picking them up right along; that he meant he had picked up considerable logs during the past thirty years

(Testimony of Robert Kruger)

off of the mud flats that according to his idea should have gone through the Coos River Boom; that one year about 1890 the sheer-boom broke; that there might have been an unusually high freshet at that time; that he thought the boom broke before that.

Witness further testified that he had been doing work for the Smith-Powers Logging Company and had looked around at the boom; that he had not inspected it but looked around and saw the improvements going on. That he saw it going by in the River but that he didn't stop at the boom and go over them; that he towed piles and boom-sticks to the Lower Boom and had been over there with Mr. Powers catching logs; that he brought the boom-sticks and piling there to drive and afterwards placed the boom-sticks around the piling; that he had been picking up logs since Mr. Powers took charge of the boom; that you could tell by the brands whether the logs came from camps up the River and that Mr. Powers and the C. A. Smith Mill paid for them; that since Mr. Powers took charge of the boom witness had been running with a boat over there and that the channel was being blocked up the same as it used to be, but not for so long; that at one time before it was blocked for three months; that the last winter it wasn't blocked long, it may have been three weeks, and that the year before it was blocked something like three weeks; that he was acquainted with the plaintiffs, had known Mr. Bernitt ever since he came to the Bay; that there was no unfriendliness

(Testimony of Robert Kruger)

but he had been meeting Mr. Bernitt week after week and month after month for a number of years and didn't speak; that when a man did the witness dirt, he never knew him again; that they never were friendly as Mr. Bernitt was bucking right along; that witness and Haglund owned a quarter interest in the boom; that Mr. Bernitt owned a quarter interest in the boom and his own rafting gear, and that witness and Haglund had owned a quarter interest and their gear; that E. B. Dean & Company claimed the other half interest in the boom; that the piling and boom-sticks that witness towed over to the booms was used for enlarging and extending them, and that the whole out-fit sold by the witness to Hillstrom was practically the same that he bought from Mattson.

Upon re-direct examination the witness testified that some of the piling taken over there was used in repairing the boom in the channel; that the scow witness had testified to buying had been built about two years; that he didn't remember the exact wording of the bill of sale but could remember the general purport of it and over the objection of the plaintiffs that this was not proper re-direct examination and that it called for secondary evidence, and there had been no attempt made to produce the original bill of sale or writing, the witness testified that the bill of sale was to the effect that for the price set out the seller was to turn over the rafting gear, scow, boats, boom-sticks, chains and everything that be-

(Testimony of G. A. Brown)

longed to the gear to the witness; that the observation of the witness was that there was a tendency for these booms to grow shallower; that the Upper Boom had filled up considerably and that formerly there was a good channel at the head of the Lower Boom which could be navigated by boats and steamers on dead low water but that it was difficult to go through on half tides then; that because of this shoaling you couldn't run logs out when you wanted to, and that it affects the value of the boom.

Upon re-cross examination, witness testified that the boats he spoke of as used in the channel had a draft of four or five feet; that the Bertha was one of the boats that drew three or three and a half feet of water; that there were snags there then and there didn't use to be before the boom was built.

Whereupon G. A. Brown was produced as a witness on behalf of the defendants and after being sworn testified in substance as follows:

That he was thirty-three years of age, was Cashier of the Smith-Powers Logging Company and had held the position since October, 1907; that he came to Coos Bay June 30th, 1907, and had been here practically all the time since; that as Cashier he had charge of all the books and accounts of the company and that all payments are made through his office; that he had charge of the bank accounts, deposits, etc., and the first occasion that he had anything to do with regard to the Coos River Boom was in

(Testimony of G. A. Brown)

the fall of 1907; that he had then heard Mr. Powers say that he would have to send a man over there to look it over and see that it was in shape to take care of the logs; that the Smith-Powers company had none of the former books or accounts and witness had made up an entire new set of books; that he could not remember whether the first entries with regard to these booms were made in the latter part of 1907 or the first part of 1908; that witness had tried to find out from Mr. Baily, at that time Cashier of the Lumber Company, how the accounts had been handled in the Spring of 1907, but he could not get any information as to how the boom account was handled, as Mr. Rutherford had handled it before; that he didn't remember of ever inquiring of Mr. Wittick, but that Mr. Bernitt came over and asked for a statement of the rafting, which witness thought he had received and witness had inquired of him how the account had been handled previously; that if witness remembered correctly Mr. Bernitt had stated that Mr. Wittick and himself together received thirty-five cents a thousand for everything rafted out of there and out of the Simpson logs they were to get $12\frac{1}{2}$ cents and the company was to get $12\frac{1}{2}$ cents and that for the logs going to the Smith Lumber Company the 25 cents would go to maintaining the booms, and if there was any balance it was to be split; that witness asked him the reason for this and Mr. Bernitt had said that they had a working interest with the old company to that effect, and the first settlement with the Smith-Powers Company

(Testimony of G. A. Brown)

was made on Mr. Bernitt's statement; that Mr. Bernitt didn't claim that plaintiffs were partners with the company in owning the boom or that they owned any title in the boom or the boom property itself, but that he understood from Mr. Bernitt that the 12½ cents came from the Simpson Lumber Company to the Smith Company because the latter owned the boom; that the plaintiffs were to get 12½ cents for looking after the boom, that that was their share of their working interest; that in the fall of 1908 or the spring of 1909 Mr. Bernitt asked for a statement of the boom account and witness told him to put in his bill and he would take care of it; that witness had no conversation with Mr. Bernitt about the Devers law suit only that Mr. Bernitt had agreed with Mr. Powers to pay \$50.00 and Mr. Wittick \$50.00; that witness didn't remember whether he rendered a statement with this amount deducted from the account but it was deducted at the time settlement was made; that at the time in 1909 when Mr. Bernitt asked for a statement he didn't put in a bill but claimed that plaintiffs owned a half interest in the boom; that that was the first time witness had heard the claim that the plaintiffs owned any interest in the boom; that this was some time in the Spring of 1909 and long after the time that he had claimed that they had a working interest; that witness didn't remember what he had told Mr. Bernitt, but thought he had referred him to Mr. Powers; that witness didn't remember the conversation Mr. Bernitt had testified to having had with him in which he had claimed

(Testimony of Charles H. Coddington)

witness stated that he had better bring in his bill at so much a day, in reply to which he had said that he never worked by the day and that witness had asked him what was the difference so long as he got his money, but that he didn't doubt but what that was what he had said, that the conversation was something to that effect; that witness had made a settlement in the fall of 1907 and 1908 and handled it on the basis of the figures that Mr. Bernitt gave him; that this wasn't done under any instructions from any officer of the Smith-Powers Logging Company; that under the arrangement he had outlined whereby if there was any surplus in the boom account after crediting it with the logs received by the C. A. Smith Company it was to be divided half to the company and half to the plaintiffs; no such division was made because there was apparently nothing to be divided; that witness thought he had told Mr. Bernitt that the account was about even, that there was only a few dollars either way.

Whereupon, Charles H. Coddington was called as a witness on behalf of the defendants, and after first being duly sworn, testified in substance as follows:

That he was 53 years of age, a resident of Flagstaff, in Coos County, Oregon, a civil engineer by profession; that he had resided in Coos County 11 years, and had occasion to examine the booms in question; that he could not remember the date but it was the day when Mr. Powers first came here; that Mr. Robin-

(Testimony of Charles H. Coddington)

son and the witness were at that time partners and did all the preliminary work for the Smith people and for Mr. Powers, after the time he took charge of the logging department; and the first work that Mr. Powers did was over at the boom; that witness and his partner were at the boom for a week and perhaps ten days, surveying the boom; that at that time no one was in charge of the boom and no one was there; that as far as the piling was concerned, the piling was all right; there were some dolphins built there that had been boarded up and many of the boards were gone, and the boom sticks were disconnected in places, the chains gone entirely; that a number of chains or toggles were in bad repair, rusted and nearly all eaten out; that the boom altogether had what the witness would call an abandoned look and did not look as though it had been used for a long time, although it might have been, and there were no evidences of any new work or piling.

Upon cross examination, witness further testified in substance that he could not identify the time of the year he was there, but it was not in the winter season, but he thought was early in the spring,—perhaps in April; that he was sure there was not a log in the boom, and they had a couple of rainy days while he was over there; that he could not be positive about the year, but thought that it was in 1907; that he called it all one boom, referring to the boom below the creamery; and the boom he worked on was the lower one; that according to the best of his

(Testimony of Charles H. Coddington)

recollection, the boom was in worse shape down at the lower end; that the place that he referred to, where the chains were connected with the boom sticks, they were connected at one end and would swing with the tides; that sometimes they would find them up one way and sometimes down below; that he did not remember of any compartments in the boom, unless it was where they had been in the habit of putting boom logs across; that he did not see any sticks run across but saw swinging sticks that he thought might have been used for that purpose; that he thought they were all over the boom from one end to the other, but they did not examine it to see if it was capable of holding logs, as that had nothing to do with their part of the business; that it would not have held logs in the condition it was in; that where the sticks were disconnected was on the island side and they were not across any stream; that he thought there were two put in some places, just single sticks; that he simply had a general idea and never examined it in detail; that he had had considerable experience in booms, building and operating, which he had picked up in this country; that he looked out for the building of the boom for Dr. McCormac upon Isthmus Slough, and that he meant that he had surveyed it and established the lines and location for the construction of the boom; that the time in question was the only time he ever really went around the boom; that he had worked at Blanco townsite a great deal and had been up there a number of times since; that he made no note of his survey,

(Testimony of W. T. Merchant)

as to the condition of the boom and had no means of refreshing his memory as to the details; that at the present time the witness was travelling engineer for the Smith-Powers Logging Company.

W. T. Merchant was then recalled as a witness for the defendants, and testified in substance as follows:

That he had been manager for the Dean Lumber Company for four years and had charge of its entire business on the Bay, including the charge and control of the booms in question; that during that time he did not recognize or deal with anyone else as having any ownership or interest in these booms; that there was no question but that he would have known of it if the Dean Company had so dealt, and that he did not know of its doing so; that he never understood that there was any understanding as partners between Bernitt and the Dean Lumber Company, and simply referred to the books and carried the entries on the books the same as they were; that Bernitt and the North Bend loggers looked after the boom and the Dean Lumber Company took half and Bernitt and Wittick took the other half; that he never understood the position with regard to it and did not know whether there was any one who really understood the boom business at all; that they simply referred to the books and made the entries and the divisions that had always been made.

(Testimony of W. T. Merchant)

Upon cross examination witness further testified in substance that during the time he was Manager, the question of ownership never arose and that prior to the time he took charge the books showed that the Dean Lumber Company got half of the revenue from the company and the rafters got the other half and that everything was charged up to the boom account and then divided up at the end of the year; that Mr. Bernitt and the other raftsmen paid their proportion of the repairing; that Mr. Bernitt did repairing on the boom, brought in his bill for it and it was charged to the boom account, and in the adjustment at the end of the year, each paid his proportion of that.

Upon re-direct examination, witness then testified that he did not remember that Mr. Bernitt ever paid anything in cash, but simply charged to the boom everything that came in and at the end of the year it was taken out of his earnings; that he did not know whether Mr. Bernitt's own work was credited to him or not, but the supplies and materials all bought for the boom were charged to it and were paid for by the boom, thought the Dean Lumber Company's checks paid for them they were charged up to the boom.

Upon re-cross examination, witness further testified that Mr. Bernitt most always had a credit with the Dean Lumber Company and if there was a deficit he was charged up with his proportion, and it was the same with Mr. Wittick or the other partner.

(Testimony of W. T. Merchant)

Upon re-direct examination witness further testified that there was a deficiency for several years and did not know when, but it was taken out of the North Bend rafters and Mr. Bernitt's credit, and credited to the boom account; that it seemed to the witness that Mr. Phipps was the bookkeeper in those days and then after the Dean Lumber Company incorporated it was Ed Dean, but that was not during the seasons the Dean Lumber Company was operating the booms.

Witness further stated that he was not testifying to the time when he was manager of the Dean Lumber Company, but away back, and the testimony he had given in answer to questions on cross examination did not refer to the time when he was manager of the Dean Lumber Company.

Thereupon, counsel for plaintiffs moved to strike out those answers as incompetent, irrelevant and immaterial, and to object to the questions on the same ground, unless they were confined to that time.

Upon re-cross examination, the witness then stated that most all of his testimony just given referred to the time outside of the time he was manager; that during the time he was manager the question of the ownership of these booms never arose; that during the time he was manager he credited one half the earnings of the boom to the raftsmen and charged the raftsmen half the repairs and the Dean Lumber Company the other half; that he could not say whether

(Testimony of G. A. Brown)

the boom ran behind at any time while he was manager; that if it had he would have called upon the raftsmen to bear their proportion of the repairs; that during this time nothing was ever said about the ownership of the boom and they followed the system of accounts that had been kept theretofore.

Upon re-direct examination, witness further testified that after his time the Dean Lumber Company opened up an entirely new set of books; that he took charge in 1902 and operated the business for between three and four years.

Thereupon, on August 24, 1912, Mr. G. A. Brown was recalled as a witness on behalf of the defendants and testified in substance as follows:

That a paper then shown him was a statement of the Coos River boom commencing September 20, 1907, and ending July 1, 1912,—that is from the time the Smith-Powers people took charge of the boom, until July 1, 1912; that it was compiled from the original files in witness' possession and most of it was compiled by the witness and all of it under his direction and control; that he was personally familiar with each of the items contained in the statement, as far as the same are shown upon the books of account of the Smith-Powers Logging Company, and that the paper was an accurate statement and showing of the Coos River boom account, as appearing upon the books of account of said Company, during the period in question and is a duplicate of

(Testimony of G. A. Brown)

the entries of the Company's books and of moneys expended on the Coos River boom; that the witness had charge of the books during all of that time, and they were still in his care and custody, and that the statement covers all that has gone into the building of the Coos River boom including the tide lands—that is all the expense the Smith-Powers Company had gone to in builing of adding to the boom, including also what they paid the C. A. Smith Lumber Company for the boom and tide lands; that this item amounted to \$2000.00 but was not transferred from the Lumber Company's books to the Logging Company's books until 1909, though the deal was made when they first came here in 1907.

The statement was then offered in evidence, whereupon the plaintiffs introduced the following objection:

“Mr. DOUGLAS: Objected to by plaintiffs for the reason that the same has not been properly identified as constituting the charges and expenses for the operation of the booms in controversy and described in the complaint; and also for the reason that no proper proof has been made as to the expenditure of any of the items therein enumerated, in the maintenance of the booms described in the complaint; and also for the further reason that the same is incompetent, immaterial and irrelevant; and for the further reason that the same purports to contain items of extensions and enlargements and the building of other booms, and also the purported expenditures as to the price paid for the land.”

The statement was then received in evidence and marked “Defendants Exhibit “C”.

(Testimony of G. A. Brown)

DEFENDANTS' EXHIBIT "C."

Coos River Boom

Commencing September, 20th, 1907

	Dr.	Cr.
Gooding & Robinson		
J. H. Harding	Survey	92.00
A. J. Sherwood	Boat Hire	.75
John Tallofson	Getting Permit	10.00
R. Kruger	Boat Hire	7.00
F. S. Dow, Agt.	" "	4.00
Whitlaw Wrecking Co.	Freight	6.79
Coos Bay Tide Land Co.	Chain	160.20
R. Kruger	Tide Lands	7155.00
	Towing	3.00
	" "	5.00
B. S. Lattin	Boat	36.00
Whitlaw Wrecking Co.	Chain	215.10
John Tellofson	Boat	11.00
Ekblad & Son	Nails	2.75
" "	" "	4.10
Thos. James	Chain	42.31

(Testimony of G. A. Brown)

DEFENDANTS' EXHIBIT "C."—Continued

E. L. Robinson	Survey	15.00
C. A. S. L. & M. Co.	Freight	6.00
Do	Labor	178.40
Jas. Watson	Recording	1.60
C. A. S. L. & M. Co.	Labor	14.00
Do	Spikes	6.20
"	Links & Staples	15.33
"	"	37.48
"	"	40.10
"	"	5.00
"	Labor on Chain	47.77
"	" " Boom	164.00
"	Spikes & Iron	14.47
"	Rings & Toggles	95.62
"	Labor on Chains	74.33
"	Piling	437.85
"	Iron	5.28
"	" & Spikes	54.89
"	Piling	46.40
"	Staples	56.34

(Testimony of G. A. Brown)

"	Lumber	.66	
"	Labor on Boom	101.00	
"	Iron, Spikes & Staples	12.99	
"	Rings & Staples	74.64	
"	Labor	279.95	
"	Piling & Booms	172.50	
"	"	118.00	
"	"	470.10	
"	"	3.50	
"	"	121.10	
"	"	311.30	
			<hr/>
Bal.		\$10736.80	\$10736.80
			<hr/>
Jan. 1st, 1909, Balance		\$10736.80	\$10736.80
			<hr/>

(Testimony of G. A. Brown)

DEFENDANTS' EXHIBIT "C."—Continued.

Coos River Boom

For 1909

Cr.

	Dr.
Jan. 1st, 1909	\$10736.80
J. Tellofson	25.00
F. S. Dow, Agt.	10.12
Baker & Hamilton	119.79
B. S. Lattin	22.75
Whitelaw Wrecking Co.	80.98
S. P. L. Co.	205.47
C. A. S. M. L. & Co.	832.74
W. F. Miller, Agt.	5.00
P. A. Devers	1500.00
S. P. L. Co.	226.70
P. A. Devers	750.00
Warehouse	23.80
Acts Payable	245.12
C. A. S. L. & M. Co.	76.22
Do.	81.39
"	2.00
"	2000.00
"	157.98
"	101.90
Balance	
Boat	
Freight	
Chain	
Boat	
Chain	
Labor	
Staples, Piling, Booms, Ring.	
Freight	
Tide Lands	
Labor	
Tide Lands	
Tools	
Miscl.	
Gears & Chain	
Toggles, Iron, and Spikes	
Labor	
Boom	
Booms & Piling	
"	

(Testimony of G. A. Brown)

S. P. L. Co.	Labor	196.35
C. A. S. L. & M. Co.	Staples & Chain	31.50
Do.	Washers & Spikes	11.50
"	Booms	151.45
"	Lumber	87.82
"	Booms & Piling	77.60
"	Gears & Patterns	45.12
"	Labor	15.75
S. P. L. Co.	Labor	157.50
Accts. Payable	Various	49.65
H. Sengstacken	Boat	1.00
C. A. S. L. & M. Co.	Boat Spikes	10.20
S. P. L. Co.	Labor	142.50
J. B. Dours	Misc.	23.00
Coos Bay Oil Co.	Gasoline	39.05
C. A. S. L. & M. Co.	Spikes	10.00
Do.	Lumber	12.32
"	Labor	15.00
Accts. Payable	Misl.	27.90
John Lapp	Boat	1.00
S. P. L. Co.	Labor	223.60
Coos Bay Oil Co.	Gasoline	89.10
C. A. S. L. & M. Co.	Lumber	5.40
Do.	Labor	62.90

(Testimony of G. A. Brown)

DEFENDANTS' EXHIBIT "C."—Continued

"	Iron and Spikes	31.18	
"	Rings, Toggles, Stap.	27.65	
S. P. L. Co.	Labor	181.10	
Warehouse	Tools	2.80	
Accts. Payable	Missl.	20.25	
C. A. S. L. & M. Co.	Spikes & Bolts	23.37	
S. P. L. Co.	Labor	232.60	
Do.	"	145.60	
Accts. Payable	Missl.	33.85	
C. A. S. L. & M. Co.	Spikes & Chain	47.98	
Co.	Rings & Toggles	17.72	
S. P. L. Co.	Labor	145.60	
Accts. Payable	Missl.	17.03	
O. Haldinen	Boat	3.00	
Warehouse	Tools	27.20	
S. P. L. Co.	Labor	100.00	
C. A. S. L. & M. Co.	Piling	209.40	
"	Lumber	28.91	
"	Missl.	51.59	
"	Iron and Chain	41.78	
Accts. Payable	Missl.	125.65	
			Bal.
		<u>\$20205.23</u>	<u>\$20205.23</u>
		<u>\$20205.23</u>	<u>\$20205.23</u>
Jan. st, 1910 Balance			

(Testimony of G. A. Brown)

Balance, Jan. 1, 1910		\$20205.23
C. A. S. L. & M. Co.	Rope	19.08
Do.	Chains, dogs, etc.	76.37
J. D. Goss, Atty.	Tide Lands	500.00
C. A. S. L. & M. Co.	Boom Logs & Lumber	39.86
Do.	Bolts, Chains & Labor	116.36
Do.	Boom Logs & Lumber	99.94
Coos Bay Oil & Supply Co.	Gasoline	37.05
Ekblad & Son	Hardware	5.82
Marshfield Hardware Co.	Hardware	4.75
Pioneer Hardware Co.	Hardware	16.34
J. D. Goss, Atty.	Tide Lands	700.00
C. A. S. L. & M. Co.	Bolts, Staples & Labor	31.65
Do.	Spikes, etc.	15.92
Alger Boat Works	Repairs	2.00
Coos Bay Oil & Supply Co.	Gasoline	46.00
Ekblad & Son	Hardware	.95
John Lapp	Cartage	1.00
Pioneer Hardware Co.	Hardware	16.65
Standard Oil Co.	Oil	1.90
Launch Tioga	Transporting Men	1.30
S. P. L. Co.	Labor	243.75

(Testimony of G. A. Brown)

DEFENDANTS' EXHIBIT "C."—Continued.		
C. A. S. L. & M. Co.	Spikes, etc.	10.60
Do.	Tools	13.60
Coos Boom Co.	Anchor	2.50
Coos Bay Oil & Supply Co.	Gasoline	37.20
Coos Bay Wiring Co.	Supplies	2.40
A. B. Daily	Pike Pole	1.60
Ekblad & Son	Hardware	3.50
Pioneer Hardware Co.	"	4.25
Geo. L. Wheeler	Transportaion	1.00
S. P. L. Co.	Labor	232.62
C. A. S. L. & M. Co.	Dogs & Staples	36.47
"	Tide Lands	2010.50
"	Rope, Chains, etc.	62.75
S. P. L. Co.	Labor	348.45
The Bazar	Supplies	.25
County Clerk	Dynamite Permit	.65
Coos Bay Oil & Supply Co.	Gasoline	37.00
Ekblad & Son	Hardware	4.40
J. D. Koontz	Labor & Material	39.50
John Lapp	Launch	.50
Marshfield Hardware Co.	Hardware	6.25

(Testimony of G. A. Brown)

Pioneer Hardware Co.	Hardware	23.55
J. W. Ross	Boat	10.00
Standard Oil Co.	Oil, etc.	4.23
Geo. Thrush	Launch	2.00
C. A. S. L. & M. Co.	Chains, freight, etc.	43.70
"	Staples, Chains, etc.	22.50
"	Rope, etc.	8.03
S. P. L. Co.	Labor	273.75
Coos Bay Oil & Supply Co.	Gasoline	23.45
Ekblad & Son	Hardware	8.10
Pioneer Hardware Co.	"	4.15
Standard Oil Co.	Oil, etc.	7.61
Whitlaw Wrecking Co.	Chain	216.98
C. A. S. L. & M. Co.		1.85
"	Labor	7.85
"	Rope	84.02
"	Staples, Dogs, etc.	31.95
S. P. L. Co.	Labor	296.00
Coos Bay Oil & Supply Co.	Gasoline	26.95
Ekblad & Son	Hardware	.55
R. Kruger	Launch	2.00
J. L. Koontz	Fittings & Labor	31.10

(Testimony of G. A. Brown)

DEFENDANTS' EXHIBIT "C."—Continued.

Pioneer Hardware Co.	Hardware	6.25
H. J. Russell	Launch	1.35
	FORWARD	\$26176.23
Standard Oil Co.	Oil, etc.	26176.23
Simon & Bros.	Chain	6.18
Mr. McGuire	Expense	248.00
C. A. S. L. & M. Co.	Rope, Chains, dogs, etc.	5.25
"	Lumber	187.86
S. P. L. Co.	Labor	89.96
Coos Bay Oil & Supply Co.	Gasoline	315.60
Coos Bay Electric Co.	Supplies	9.75
Ekblad & Son	Hardware	5.50
Marshfield Hardware Co.	"	6.60
Pioneer Hardware Co.	"	16.25
Standard Oil Co.	Gasoline, etc.	22.60
J. W. Young	Launch	23.29
C. A. S. L. & M. Co.	Labor	2.00
"	Rafting dogs	267.82
"	Lumber	19.25
		51.49

(Testimony of G. A. Brown)

"	Rope, etc.	57.16
"	Staples, chains, etc.	62.87
"	Lumber	4.28
Bills Payable	Tide Lands	1300.00
S. P. L. Co.	Labor	204.02
Coos Bay Oil & Supply Co.	Gasoline	2.40
A. B. Daley	Supplies	27.32
Ekblad & Son	Hardware	18.15
C. A. Johnson	Supplies	1.30
Robert Kruger	Launch	23.50
Marshfield Hardware Co.	Hardware	1.25
Nelson Iron Works	Supplies	1.50
Pioneer Hardware Co.	Hardware	.35
Standard Oil Co.	Gasoline	30.41
Ben Wright	Labor	1.00
Henry Bishop	Chains	20.00
J. D. Goss, Atty.	Tide Lands	700.00
Pioneer Hardware Co.	Supplies	15.00
C. A. S. L. & M. Co.	Labor	45.56
"	"	276.31
"	Piling	18.35

(Testimony of G. A. Brown)

DEFENDANTS' EXHIBIT "C."—Continued.		
C. A. S. L. & M. Co.	Lumber	16.45
"	Booms	166.65
"	Lumber	5.25
"	Piling	733.25
"	Staples	4.00
"	Rope, etc.	9.23
		<hr/>
		\$31199.19
Balance, Jan. 1, 1911.	Spikes	9.58
C. A. S. L. & M. Co.	Painting Signs	6.30
Roy C. Lawhorne	Piling	165.50
C. A. S. L. & M. Co.	Boom Sticks	92.66
Chas. H. Kroeger	Towing Booms	30.00
Joe Lapp	Launch	5.00
Tioga Launch	Launch	1.75
C. A. S. L. & M. Co.	Labor	38.00
"	Rope, etc.	13.97
		<hr/>
		31561.95
		111.00
		<hr/>
		31450.95

(Testimony of G. A. Brown)

Witness further testified that he had drawn all the checks and paid the money for the Smith-Powers Logging Company during the period covered by the statement, "Exhibit "C", and drew the checks and paid the money for all the items that appeared in the account, excepting what was bought from the C. A. Smith Lumber Company; that the logging company handles a great many logs for the C. A. Smith Lumber & Manufacturing Company; that they have extensive dealings between each other, and these are settled mostly by statements rendered; that the Lumber Company charges the Logging Company with anything it receives from it and the Logging Company charged whatever department the stuff was for and credited the amount on its bill to the Lumber Company, and that the witness had personal knowledge of and supervision of all those entries; that after 1908 the Logging Company kept no separate account of the expenses of operating and caring for the boom, independent of the expensess of rafting and towing away from the boom.

Witness was then shown a paper marked "Expense Coos River Boom," and in response to the question as to what it was, stated:

"This is an expense statement showing the amounts expended on maintaining the boom based on the expenditure of 1907 and 1908, which figuring per thousand 1907 and 1908 at 8 cents per thousand for all logs going through there, as the expense account

(Testimony of G. A. Brown)

had not been kept separate for rafting and maintainance the previous years, was gotten at by taking the same rate, 8 cents per thousand for 1909. During 1910 it was pro rated at 5 cents per thousand, lower than the previous years, owing to the fact that a larger amount of logs were handled that year. 1911 was likewise pro rated and 7 cents per thousand charged for maintainance. 1912 up to July 1st. was handled likewise, pro rated at 6 cents per thousand for maintainance. The other items on the statement, covering taxes, labor, looking after the boom and the account of G. A. Brown and A. H. Powers, also on the expense account each year 6% interest on all moneys invested in the boom proper."

Witness further testified that the items of taxes were the actual taxes paid on tide lands and on the boom; that the items gasoline, material, repairs and labor, are the actual items pro rated for the first year 1907-1908; that the item "Labor, A. H. Powers," and G. A. Brown," charged at the rate of \$150.00 a year, was \$10.00 a month for G. A. Brown five months during the year, and \$20.00 a month for Powers for five months during the year, which five months the witness called the boom rafting season, as experience had shown that that was in the neighborhood of the time the boom was operated, although there was more or less book work and supervision throughout the year; that the amount charged in this item was a very fair average considering the total salaries received by Mr. Powers and the witness;

(Testimony of G. A. Brown)

that the item of 6% interest was a charge upon the balance as shown,—that is the capital account of the boom for each year.

Thereupon, the statement being offered in evidence, the plaintiffs introduced the following objection thereto:

“Objected to by the plaintiffs’ attorneys for the reason that the same is incompetent, irrelevant and immaterial; that the items therein mentioned are not properly proven and are improper items of expense to be charged to the said boom described in the complaint; and for the further reason that each and all of these said items purport to cover any and all extensions to the booms, together with items of cost, and that they are improperly segregated or separated so that the items which they purport to represent cannot be investigated or explained.”

Whereupon the instrument was received in evidence and marked “Defendants’ Exhibit “D”

(Testimony of G. A. Brown)

DEFENDANTS' EXHIBIT "D."

Expense Coos River Boom.

1907 & 1908	Misc. Material Repairs and Labour	548.27	1350.47
	Labour A. H. Powers and G. A. Brown	150.00	
	Taxes Tide Lands	8.00	
	Interest 6%	644.20	
1909	Misc. Material Repairs and Labour	836.42	2247.23
	Labour A. H. Powers and G. A. Brown	150.00	
	Taxes Tide Lands	48.50	
	Interest 6%	1212.31	
1910	Misc. Material Repairs and Labour	807.78	2982.23
	Labour A. H. Powers and G. A. Brown	150.00	
	Taxes Boom	85.00	
	" Tide Lands	67.50	
	Interest	1871.95	

(Testimony of G. A. Brown)

1911	Misc. Material Repairs and Labour	736.04	
	Labour A. H. Powers and G. A. Brown	150.00	
	Taxes on Boom	85.00	
	“ Tide Lands	87.85	
	Interest 6%	1883.05	2941.94
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1912 to	Misc. material, Repairs and labour,	304.70	
July 1st.	Labour A. H. Powers and G. A. Brown	75.00	
	Taxes Boom	42.50	
	“ Tide Lands	43.93	
	Interest 6%	941.52	1407.65
			<hr/>
			10929.52

(Testimony of G. A. Brown)

Witness then was shown another paper which he declared to be a correct statement of the logs and piling handled through the Coos River boom, from the Fall of 1907 to July 1, 1912, showing the credits of 25 cents per thousand, that was compiled from the books of the Smith-Powers Logging Company to cover the period it had charge of the boom, and is an exact statement of the amount of logs and piling, as far as witness could figure it and as shown by the books of the Company; that the amount in dollars and cents is not shown upon the company books, but it is computed at 25 cents for everything that had come through the booms during the time the Company had charge of it.

The instrument being then offered in evidence, the plaintiffs introduced the following objection:

“Objected to for the reason that the same is incompetent, irrelevant and immaterial, as not properly proven as showing the correct amount of logs and the value thereof at twenty-five cents a thousand, or the correct amount of piling at the rate of a quarter of a cent a foot, which passed through said booms during the time it is claimed.”

Whereupon the instrument was received in evidence and marked “Defendants’ Exhibit “E.”

(Testimony of G. A. Brown)

DEFENDANTS' EXHIBIT "E."

LOGS RECEIVED THROUGH COOS RIVER BOOM

SMITH-POWERS									
SIMPSON LUMBER COMPANY					C. A. S. L. & Mfg. Co. LOGGING COMPANY				
1907 &	Logs	Piling	Amount	Logs	Piling	Amount	Logs	Amount	Total
1908	4333200		\$1083.30	1212960		\$303.22	1396960	\$349.24	\$1735.76
1909	4817933		1204.48	2775537		933.86	2861659	705.41	2843.75
1910	10164233	104601	2802.55	1200888	3770	309.64	4519600	1129.90	4242.09
1911	4189365	18546	1093.45	1105419		276.35	5173802	1293.45	2663.25
1912	5425065	37948	1451.13	2458063		614.51	2178132	544.53	2610.17
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	28929796	150095	7634.91	8752867	3770	2437.58	16130353	4022.53	\$14095.02

(Testimony of G. A. Brown)

Thereupon witness testified that the piling was charged thereon at a quarter of a cent per lineal foot.

Upon cross examination, witness further testified in substance that it was the understanding of the witness from the conversations he had with Mr. Bernitt that the latter represented that he had only a working interest in the boom; that this was at the time he made the first settlement, but he could not state positively the year; that witness had asked Mr. Bernitt how it had been handled previously and why it should be handled in the way he explained it, and that was the impression received by the witness from the conversations he had with Mr. Bernitt; but that witness would not swear that Mr. Bernitt made a flat statement to that effect.

Witness was thereupon asked if he knew what the item, "Gooding & Robnison, \$92.00," was in Exhibit "C" was for, and testified that it was for surveying at the booms in order to get the first permit they had from the Government; that it was surveyed in order to make a map of the land that was wanted for the permit, including only the land they wished the permit for; that if he remembered correctly, the survey was made on the land in the lower channel, or rather on the water-front fronting what was known as the Holland Island, which was the first land which the Company got a permit from the Government to build a boom in front of; that the blue print and

(Testimony of G. A. Brown)

survey covers the first division of the North Channel, as ordered by the Government; that if you consider that all of the North Channel is a part of the north boom, then the survey in question covers nothing but the old boom; that the Company had two or three permits for the lower boom, and other surveys were made by the Smith-Powers Company and the engineer at the mill, and no charge was made therefor, covering the balance of the permits; that this charge covered only the surveying for the first permit and that witness didn't know whether that permit exceeded the limits of the old lower boom; that the next item for boat hire, 75 cents, would have been for taking Mr. Robinson and somebody over there in connection with the boom, but he had no actual knowledge as to whether it was or not; the next item, "\$10.00, A. J. Sherwood, getting permit," covers the first permit received from the Government, handled through Mr. Sherwood; that the next three items were expended for the construction of the boom, and were actually expended for the building of the boom, not for its maintenance; that these refer to the extensions and building of the boom; that the next item, "Chain, \$160.20" was used in splitting the lower channel and fixing up the booms; that whether it was used outside of splitting the channel depended upon how far it would go; that if any chain was left it would be used; that it was used on the boom as it stands now, with the extensions and splitting of the channel; that the next item, \$7,155.00, tidelands, were tidelands bought from

(Testimony of G. A. Brown)

the Coos Bay Tideland Company, which lie south-east of the old lower boom; that witness was under the impression that the boom in controversy fronted on part of these tidelands; that the next items, "towing \$3.00 and \$5.00," was for towing piling and boom sticks over there and splitting the channel; that the item "Boat, \$36.00," was for the boat used during the construction of the extensions of the boom and splitting the channel; that the item "\$215.10," was for chain used for extensions and building; that the statetemt n covers the boom property only and no charges for the maintenance of the boom; that the item on the second page of the statement, "P. A. Devers," Tidelands, \$1500.00," was for the purchase of tidelands upon which the booms were loacted; that the upper dolphin was on land claimed by Mr. Devers and the Company bought it to protect the boom; that the dolphins were some of them built by the Smith-Powers Logging Company and some of them were old ones; that the actual investigation was made by Mr. Powers and the witness had no personal knowledge of it; that judging from the map and descriptions of the land bought from Mr. Devers, the witness knew that part of the old boom was on this land, but not how much; that he would not be willing to say that one fifth of the land occupied by the old boom; that the same facts held good as to the item "P. A. Devers, \$750.00, Tideland;" that this was the same piece, only there were two booms put on it and the total was \$2250.00; that the item "\$2000.00, Boom,"

(Testimony of G. A. Brown)

C. A. Smith Lumber & Manufacturing Company, is what the Smith-Powers Logging Company paid the Lumber Company for the boom; that it was paid in 1909 and the Smith-Powers Logging Company was operating the boom prior to that time; that the items "Booms and piling" refer to boom sticks or sticks that the boom was built with; that the item "\$700.00 to John D. Goss, Tidelands," was for tideland bought from Alvin Smith in order to swing the sheer on the upper extension of the new boom; that this was an extension made to the old creamery boom and this land lay on the other side of the river and was not connected in any way with the old booms; that the item "\$2010.50, Tidelands, C. A. Smith Lumber & Mfg. Company," was for Lot No. 2 in what is known as the Holland Island and another parcel of tideland in the lower boom; that the tidelands were in the vicinity of the lower boom, excepting Lot No. 2, upon which the creamery boom was supposed to front and upon which the extension to the creamery boom also fronted; that the Holland Island was bought at the rate of \$50.00 an acre; this was the price paid for all tidelands over there that were bought from C. A. Smith; that the lower boom fronted all of that tideland; that the item of \$2010.50 was charged to the Logging Company by C. A. Smith, who owned these tidelands personally; that the item "\$1300.00, Bills Payable," Tidelands, on the fifth page of the statement, witness thought was for the tidelands bought from the McIntosh Estate; that

(Testimony of G. A. Brown)

the lower part of the creamery boom fronted on the McIntosh property; that the item "John D. Goss, Tidelands \$700.00," appearing on the same page, was a part payment on the McIntosh purchase; that the item, "\$2000.00," on second page of statement, of Exhibit "C," was the amount paid by the Smith-Powers Logging Company to C. A. Smith for the boom proper, and did not include any lands and was paid to the C. A. Smith Lumber & Mfg. Company; that the item "\$500.00, John D. Goss, for Tidelands," was to P. A. Devers, witness thought, though he could not state positively without looking up the check; that none of the items as shown on this statement were charges for maintenance of the boom; that the old booms were practically built new, but witness was unable to separate the items on the statement which enter into the reconstruction of the old booms from the items which were put into the charges for extensions.

Witness then testified that he could swear as positively as a man could swear to anything that each and every item of material appearing on that statement went into the construction and reconstruction of the present boom; that bills came in of course for a lot of material and stuff and it is all shown where it goes to, that it is charged to various departments the same as in any organization; but if any of the items went amiss witness could not say that they were put in there into the boom; that in regard to defendants' Exhibit "D" the first item, "Miscellan-

(Testimony of G. A. Brown)

eous material and labor and repairs, \$548.27," came from the company's books under the account of "Coos River Boom Expense," and consisted of chains, rope, staples, labor and putting them on; that he did not know exactly how much rope was used and that it was the actual cost of maintenance during the fall of 1907 and the year 1908; that he made the original entries covering these items in the books himself and got them out of the bills; that the account of the Coos River Boom was kept by the Smith-Powers Logging Co. for the years 1907 and 1908 and the boom was turned over to the Smith-Powers Logging Co. in 1907; that the item of "Taxes and Tidelands," were the tidelands bought from C. A. Smith and did not include other lands, except what the old booms were on; that the first item in 1909, "\$836.42," was made on the pro rata per thousand feet on logs that came through there, figuring on the basis of the first year; that the figures did not represent the actual outlay for material, repairs and labor in maintaining the boom during the year 1909 but were approximately only a fair proportion that the same was charged for the same items for the years 1909, 1910, 1911 and 1912; that the taxes for the year 1909 on tidelands included the taxes on the lands purchased from other parties besides C. A. Smith and upon different lands from those upon which the old booms were situated on; that the item of taxes for the year 1910 covered all the tideland bought for the boom and charged to the boom; that there are separate items

(Testimony of G. A. Brown)

for the taxes on the boom proper; that the taxes for the year 1911 and 1912 on tidelands also embraced all the lands that were acquired and being used for boom purposes and embraced other lands than those originally covered by old booms; that the item of taxes for the years 1910, 1911 and 1912 covered the taxes on the booms as they now stand with the extensions; that the item "interest \$644.20," at the bottom of the first page of Exhibit "C," covered the total expenditures made for other lands and embraced the newly constructed portion of the present boom; that the items of "interest" were all based upon the same statement and covering the total invested at the end of the year, as shown by Exhibit "C"; that no attempt was made to show the taxes upon the land covered by the old boom separately, nor the interest on the money invested in the land and booms as they stood originally; that in arriving at the figures as shown by the Exhibit "D" for the material, repairs and labor for the years 1909, 1910, 1911, the estimates were not made in view of the actual expenditures and on a basis of the expenses for 1907 and 1908, taking general conditions into consideration; that the figures in Exhibit "E", comprising the amount of logs and piling, were taken from the original records of the Smith-Powers Logging company; that the Logging Company keeps an accurate record of the feet of logs and piling that pass through the Coos River boom, according to the statements received from the Simpson Lumber Co.

(Testimony of G. A. Brown)

and the C. A. Smith Lumber & Mfg. Co., as the logging company simply takes the scale given by the mills; that the logs belonging to the Smith-Powers Logging Co. are all charged for at the same rate on this statement as the logs belonging to the Simpson Lumber Company, with the exception of the year 1911, as previously explained; that the logs for the year 1911 were not credited to the boom account and there were 5,173,802 feet not credited to the boom account for the year 1911; that the item 1,396,960, logs Smith-Powers Logging Co. for the years 1907 and 1908, came from Hodges Creek; that the logs for the year 1907 came from Hodges Creek and likewise 1910; that the logs for 1911 probably came out of the East Fork and some from Hodges Creek; that the camp was moved in 1911 from Hodges Creek over to East Fork on Coos River; that there are no South Fork logs included in the statement; that the Company started in on the South Fork of Coos River in the fall of 1911; that he was not positive that the whole winter's output did not come through the boom, practically.

Upon re-direct examination, witness further testified in substance that the statement showed all the logs that came thru' the booms as far as he could ascertain, outside of what came from the South Fork of Coos River; that in the conversation with Mr. Bernitt he did not claim to be a partner with the Smith-Powers Logging Co. or to have been a partner with the Dean Company only as far as a work-

(Testimony of G. A. Brown)

ing interest was concerned; that the witness did not try to ascertain at that time exactly what the claim in regard to it was, but understood him to claim a working interest only, and was based upon the conversation with Mr. Bernitt; that Mr. Bernitt's statements were such that the witness received a very fixed impression that all the interest the plaintiffs had in that boom was a working interest and his statements were with regard to the way they handled the account and the way they handled the boom and did the work; that in regard to Exhibit "C", practically all of the work charged for in 1907 and 1908 was for splitting the channel and there were no extensions that year, as far as witness could remember; that the splitting of the channel reduced the size of the boom instead of increasing it, but this required by the government on account of the complaints made by parties on the other side of the channel; that the various items in the account showing purchase of tidelands were the prices actually paid for the several parcels of land; that the price paid the C. A. Smith Lumber Company and C. A. Smith was determined by the price that the Smith-Powers Logging Company paid the Coos Bay Tideland Company,—that is, \$50.00 per acre, as neither the Coos Bay Tideland Company nor any of its officers were in any way connected with or interested in the Smith-Powers Logging Company or the C. A. Smith Lumber & Mfg. Company; that he did not know most of the parties interested in the Tideland Company,

(Testimony of Arno Mereen)

but did know of his own knowledge that no one acknowledged that the Smith-Powers Logging Company or the Smith Company had any interest in the Tideland Company; that Defendants' Exhibit "C" shows everything that was bought to go into the boom and expended on the boom as far as the books and the witness' knowledge went, and there are no other items of material or labor that went into the boom that are of any material size or consequence; that any such items would be merely something that were deferred incidentally.

Upon re-cross examination, witness further testified that at the time of the conversation with Mr. Bernitt he was simply trying to learn from him the manner in which the different items, charges and credits should be made.

Whereupon Arno Mereen was called as a witness on behalf of the defendants, and after being first duly sworn, testified in substance as follows:

That he was 54 years of age, resided in Berkeley, California, and was the General Superintendent of the C. A. Smith Companies, including all of them; that the C. A. Smith Lumber & Manufacturing Company was one of them, and that he had held the position of superintendent for 13 years; that from 1907 to 1908 he spent the greater part of the time in Marshfield and had full charge of the C. A. Smith Lumber & Manufacturing Company; that he did not remember of meeting Mr. Wittick or of meeting

(Testimony of Arno Mereen)

Mr. Bernitt and the only conversation he had was on the dock in front of the old Dean & Company's store one Sunday morning, and was the year they were building the new mill, 1907, some time during the summer; that as witness remembered it, he and Mr. Powers had been talking in connection with some claims that Mr. Bernitt was making relative to ownership or partnership in the boom with the Dean Lumber Company; that he still held an interest in them and that Mr. Powers called witness's attention to it, and witness was called into the conversation and told Mr. Wittick or Mr. Bernitt that they did not know him in the deal; that the company could not recognize him in any such deal; that the company knew of no such claim in taking over the property and were not made aware that there was any such deal; that witness did not remember what remark Mr. Bernitt made but did not think he said anything; that witness was on the ground with Mr. Smith, looking over the property, when the purchase of the Dean Lumber Company property was made; that they had the titles and the property examined, and were not made aware by the examination or from any source, of any title or claim by Mr. Bernitt or Mr. Wittick in or to the property in question, or any part of it.

Upon cross examination,———witness further testified that he did not inspect the boom properties at that time, and that he remembered some conversation with regard to Mr. Bernitt's requesting the furnishing of some 90-foot sticks to be used for the

(Testimony of Dan McLaren)

boom; that he did not remember the year, but it would be the same year,—1907.

Thereupon there was introduced in evidence, the deposition of Dan McLaren, a witness on behalf of the defendants, taken and pursuant to stipulation therefor, before Joseph C. Dockerill, Deputy District Registrar of the Supreme Court, at the city of Vancouver, province of British Columbia, on the 9th day of August, 1912, in which the witness, having been first duly sworn, testified in substance as follows:

That he was 47 years of age, by occupation a woodsman, and at present lived in Vancouver, B. C.; that he was engaged on the booms in question from June first, 1909, to August 1st., 1911, as foreman thereof, and was familiar with the boom at that time; that he first saw the boom June 1, 1909 and at that time it was a new boom; that there are tracings of the old boom there, but all the piling, except a very few, were new; that it had all been renewed; that he could tell this from inspecting it and it was all rebuilt; that he was employed on the boom by the Smith-Powers Logging Company; that during the time he was employed there he was building or repairing the boom all the time; that the old piling was rotted and was burned out by dynamite and old boom sticks were set adrift, this work being done by the witness and the men working for him; that at the time he left there half of the old piling remained in the boom;

(Testimony of Dan McLaren)

probably a dozen or two dozen on the shore side and none of the old boom sticks or chains remained; that they were practically new chains; that at that time there were probably 800 or 1000 piles, new piling in the boom, although it was quite a long while ago; that he could not say exactly how many new boom sticks and chains there were in the boom, but there would probably be 400 boom sticks and as many chains, cross chains, and chains at the end of the boom sticks; that when he first saw the boom, the dolphins were rotted, and new ones put in when he left; that when he first saw the boom, some of the dolphins were new and after they had been put in the old ones went out and piling was stuck around to hold the old ones up, where they were not new;

Witness further testified that he had worked upon booms all his life, first in Canada on the Ottawa River, and had worked 20 years for the Weyerhaeuser Company at Cloquet, Minnesota; that he also worked for the Smith-Powers Logging Company; that he worked on the Ottawa River as a driver on the river and on the booms and worked on the booms for the Weyerhaeuser Timber Company and was their foreman for probably a year; he next worked as foreman on the boom at Marshfield, Oregon, and that he was familiar with the cost of piling and of maintaining booms, and the value of piling, boom sticks and other similar appliances; that the value of the old boom on June 1st., 1909, was probably \$3000.00 or \$4000.00; that the old boom, that is, the old material,

(Testimony of Dan McLaren)

was the witness would say, useless; and that the new boom and material, including everything except the site, would be worth \$15,000.00 or \$20,000.00; that he had had 5 or 6 years experience in salt water on the Pacific Coast; and that piling similar in size and character to those of which the boom was composed in situations similar to that of the boom in question, would last probably 8 or 9 years if not looked after, and probably 20 years if looked after; that he could not say exactly the servicable life of boom chains under such circumstances would be, but the new chains on this boom were simply rotted,—that you could kick them to pieces, and he supposed they were there ten or twelve years; that in order to constitute a proper and sufficient boom for handling the character of logs and material that came to the booms in question, it takes lots of piling, lots of dolphins, good boom sticks, good booms and chains, to make it solid; that the dolphins are about 500 feet apart, some of them might be 200 feet apart; that the one on the sheer booms is 8 sticks wide and probably 800 feet long, with cross pieces and cross chains; that there are 8 dolphins and big sheers there; that in making such a boom, boom sticks would generally be 60 feet long, of fir timber that would run from two feet at the butt; that the boom chains would be about 8 feet long, of $\frac{1}{2}$ -inch iron; that in the opinion of the witness, the old boom would not have withstood the strain incident to the freshets and the catching and holding of the logs and debris that came into the

(Testimony of Dan McLaren)

boom, during the time he was employed on it; that he knew the plaintiff, Bernitt, personally, and the plaintiff, Wittick, by sight, and neither of them were employed around or upon the boom or rendered any service to us while he was there.

Upon cross examination the witness deposed in substance as follows:

That his experience upon booms in salt or brackish water was of 6 years' duration and that during that time he had worked on the booms in Coos Bay and around Vancouver, B. C., for Robertson & Hackett; that he worked three years in Marshfield, then worked 3 or 4 months in Portland, making about three and one half years in the United States on the Pacific Coast; that a dolphin is a cluster of piling driven in a boom in a v-shape and planked out and dolphins serve for mooring purposes; and that these dolphins were from 400 to 500 feet apart, some about 200 feet apart; that there were 8 or 10 dolphins together and the sheer booms are placed alongside the dolphins, and the sheer booms are to sheer logs into the main boom, which is situated below the dolphins; that he never had any talk with either of the plaintiffs, neither of them ever worked on the boom while he was there; that he was there all the time except when he would be up the river bringing logs down and there was never over three days that he was not there; that he was there all the time on a special occasion he would have to go up on the river,

(Testimony of Dan McLaren)

which happened probably 8 or 10 times, on which occasions he would probably be away a day; that he went there in the employ of the Smith-Powers Logging Company, but did not know anything of who owned the boom prior to that time; that he took his orders from Mr. Powers, superintendant or manager of the Smith-Powers Logging Company; that his instructions were to run the boom according to his discretion; that when he first saw the boom it was practically new; that they had completed the boom,—everything new except about a dozen old piling on the shore side and whatever repairs or renewals were there were made for the Smith-Powers Logging Co.; that sometimes four or five men were working on the boom for him and sometimes only two; that there were just three of them working there when he left; that during the time he worked there witness removed probably 200 or 300 old piling; that this was piling they removed after putting in the new piling; that some of the piling removed were dolphins; that the chains were rotted and useless and the boom sticks were rotted and worn out from chafing against the piling and that he did not know how many of them had been used; that he examined the piling and the boom sticks and went over them all; and that when he left there were a few old piling along the shore side, about a dozen, used to keep the boom from bagging out; that prior to his coming to Coos Bay he had never worked on a logging boom in tide water, only a little while in Portland, for the

(Testimony of Dan McLaren)

Western Lumber Company, as a laborer; that the life of ordinary piling, such as in the boom in question, in salt water, was 8 or ten years; and if the pile is not looked after they will rot from the top; but that the toredoes do not bother the piling at the Coos River boom much; that the old piling was rotted right down to water, so that at high tide they would be useless for the purpose for which they were built; that the boom sticks were not attacked by toredoes but were worn by chafing against the piling; that the water there does not get very salty; that the ordinary life of a boom chain, such as was used in this boom, would be about 10 or 12 years in that locality; that this is what he was told; that they claimed that was the length of time some of the chains were in there; that any old boom sticks they took out they had to chop to get out and let them go adrift; that the piling was blown out, and was fir piling from a foot to two feet in diameter, and anywhere from 10 to 30 feet long; that he understood the plaintiffs were claiming that boom which would include dolphins, piling and everything and that the old ones were no use; that he did not know how many boom sticks and piling there were in the construction of the old boom, but would say about 1200 to 1500 piling and 400 or 500 boom sticks in the new boom, not including the sheer boom, and there were probably 200 boom sticks in the sheer booms; that he was not working in the boom at the time of giving his testimony; that he was employed by the Smith-Powers Logging

(Testimony of Dan McLaren)

Company as foreman in charge of the boom,—to keep it in order, and that the company furnished the material and labor and that he had never undertaken the construction of a boom in tide water where he had to get the labor and supply the material himself, and had never undertaken to construct a boom as a contractor, and was always employed or under somebody else's orders; that the old stuff was worthless and useless for logging purposes and that the boom sticks were set adrift; that there were probably half a dozen sticks on the shore side; that he didn't know anything about the rights or wrongs of the matter in controversy, and that if not looked after, a boom, including dolphins and everything, would last only 10 or 12 years; that by looking after them well, sloping the piling on top and tarring them to protect them from moisture, and looking after the booms when a big storm comes on, and keep the sticks from going to pieces as they work up and down; that after every storm you have got to look after them to prevent them from becoming damaged, and also the cross pieces; that the cross pieces are the sticks that hold the bouble boom together on each side of the piling; that these cross pieces require looking after in case of a storm, and that if looked after in the shape that the Smith-Powers Logging Company keep a boom, witness would say that they would last twenty years; he supposed that they would rot through in time, and would wear through in time; that he didn't know what the new booms constructed

(Testimony of A. H. Powers)

there would cost but he would put it at \$20,000.00; that the material and repair was worth that, altho' he did not keep track of it.

Whereupon, and upon December 6, 1912, A. H. Powers was called as a witness on behalf of the defendants, and after being duly sworn, testified in substance as follows:

That he was fifty years of age, resided in Marshfield and was Vice President and General Manager of the Smith-Powers Logging Company, having held these positions ever since the organization of the company in 1907; that he held a substantial stock interest in that company but was not interested as a stockholder or otherwise in the C. A. Smith Lumber & Manufacturing Company; that he had general charge of the entire business of the defendant, Smith-Powers Logging Company, and was acquainted with the property in this suit, having first seen it in the month of February, 1907; that at that time the witness went over the boom in question, as Mr. C. A. Smith had told him that he had purchased them from the Dean Company, and witness looked them over with a view of purchasing and handling them; that he did not see any one present at the time he looked it over, and that he did not think there were any logs in the boom; that he met the plaintiff, Bernitt, in the summer of 1908, but did not meet the defendant, Wittick, until the fall of 1908; that neither of them were present on the boom at the time he

(Testimony of A. H. Powers)

first inspected it; that in July, 1907, the Smith-Powers Logging Company purchased the boom from the C. A. Smith Lumber & Manufacturing Company, which at that time claimed to be the owner; that the deal was made with Mr. Oren in the month of July or August, and that witness agreed to pay and did pay \$2000.00 for what there was there,—for the boom and two fractions of land, 18.59 acres; that prior to making the deal with Mr. Oren, the witness had gone over the property several times and Mr. Oren had gone over it with him; that Mr. Oren had no interest in the Smith-Powers Logging Company and it was strictly a business deal; that the condition of the boom at that time was very poor; that many of the piling were rotted out, practically, that a person could not handle logs through booms in the shape they were in, economically, as there were no rafting pockets and it would cost a great deal more than it should to handle the logs, the shape it was in; that a great many of the boom sticks were rotted, water-logged, absolutely run down and entirely out of repair; that most of the chains were in such poor condition that you could kick them out with your foot.

Pieces of iron shown were here identified by the witness as having been taken by him from the boom, and were received in evidence and marked defendants' Exhibit "A".

Witness then further testified that there was lots of just such chain on the boom when he purchased

(Testimony of A. H. Powers)

it; that the sheer booms were in bad condition; that they had never been properly made; that there were cross pieces on top of them and they were fastened together with staples and pieces of old chain, and many of the sticks were sunken, water-logged and in an unsafe condition; that the sheer booms were not heavy enough; that the cross pieces should have been mortised in, and the cross chains were old and were not chained together with good toggle chains, as a boom should be.

Witness further testified that he had been working on booms and building booms and river driving, since 1876; that it had been his main occupation, and that he had built many booms, having helped build booms for the Mississippi & Rum River Company at Minneapolis, which booms handled the entire cut of the Mississippi River, handling more than any other booms in the world; that he had also built the Muskegon booms in Michigan, the Aitken Lumber Company's booms on the Mississippi, and constructed a great many booms and improved others for himself, since 1881, and knew the cost of building and repairing the same; that at the time he purchased the booms in question, he would not have given more than \$500.00 for the boom that was there, but paid \$2000.00 because of the two fractions of land where the was built; that on account of the subsequent requirements of the Government, that he had to tear out quite a bit of what was there and improve the

(Testimony of A. H. Powers)

same, and that made the stuff less valuable than he thought it was at the time of purchase.

Witness then testified as follows:

“Shortly after I bought the boom I talked to Mr. Squire, the man who had been superintendent for the Dean Lumber Company and was working at that time for the C. A. Smith Lumber & Manufacturing Company; he introduced me to Mr. Bernitt and told me about the rafting and what he had paid Mr. Bernitt for doing the rafting, and I went over there with Mr. Bernitt and looked over the boom with him and made arrangements for him to raft our logs that season, just as he had always done the rafting; that we hadn’t any rafting gear and had but very few logs coming by the river. I was willing for him to handle it the same as he had always handled them, for that season.”

Witness then testified that he made application to the government, to Mr. Polhemus, he thought, for a permit to have the boom there; that this application was made because there was so much complaint lodged about it, and it was made in November or December, witness thought, and in Mr. C. A. Smith’s name, as the title to the land then stood in his name and the government would grant a permit as long as he owned the riparian rights.

Witness was then shown defendants’ Exhibit “A”, which he identified as the government’s permit at that time granted him for the logging boom on Coos

(Testimony of A. H. Powers)

River, and testified that he procured the same from the government engineers at Washington; that he went to Portland and went over the situation with the Government engineer, Colonel Roesler, who informed witness that he would have to get a blue print for the place surveyed and own the riparian rights on one side of the river; that he had the blue print in question prepared by Mr. Robinson.

Witness further testified that the letter stating the transfer had been made, (being a part of Exhibit "A,") was received by him in the regular course of the mail and attached to the rest of the Exhibit, and referring to the blue print Exhibit "A," testified that the dolphins shown in the center were the ones he had to blow out, and the marks at the lower end in red ink were the new booms, but that there were a few old piling below it.

Witness then testified that the land purchased at this time was marked on the permit as "C. A. Smith Island", and another piece marked "Tide Land C. A. Smith"; that it took in a piece of tideland at the upper end of the boom from near the upper dolphin down to near a point marked "51" and from there down to the lower end of the old boom; that the lower part was mainland and the upper piece tideland.

Witness further testified, over the objection of plaintiffs that the same was incompetent, irrelevant and immaterial, that the Government required him

(Testimony of A. H. Powers)

to clear out all the dolphins from the center of the channel and rebuild a piling boom and put a dolphin in the middle of the channel at the upper end of the boom; that at the lower end of the boom they made him clear it out and take out two dolphins; that there was no boom where the red line is up the middle of the channel, (defendants' Exhibit A) at the time of the purchase; that, over plaintiffs' objection that the same was incompetent, irrelevant and immaterial, in the changes required by the government the old boom was not worth to exceed \$500.00 at the time of the purchase; that, over the plaintiffs' objection that the same was incompetent, irrelevant and immaterial, there was considerable expense involved in removing the old plant and that witness thought the benefits he had from the old boom would not exceed \$500.00, and that it would almost have been better if he had taken it all out and put in an entirely new structure.

Witness was then shown a document and testified that the blue print had been made for the Smith-Powers Logging Company and the instrument had been received from the Government engineers in Washington about December 26, 1908, and that the blue print represented the extensions to the lower boom in the north channel of Coos River, which instrument was then received in evidence over plaintiffs' objection that the same were incompetent, irrelevant and immaterial, and marked "Defendants' Exhibit 'F'".

(Testimony of A. H. Powers)

Witness further testified that the boom had been built in accordance with the permit and that it now formed a part of the booms at the mouth of Coos River; that at the time the purchase was made he examined the condition of the upper or creamery boom, and found it in poor condition; that there were some parts of it in some little better shape than the lower boom, but that it had been built too long and had outlived its usefulness; that the water in it was very shallow, almost entirely dry at low tide and they would use it only on freshets.

Witness further testified that he was familiar with the tendency of land enclosed with piling and booms, on the waters of Coos Bay, and that such enclosing the submerged lands caused them to fill up with sediment and become very shallow.

Witness was here shown a blue print purporting to represent the upper Coos River boom, or the creamery boom, and testified that the place near the center of it that was not marked in red was where the old boom was, and was marked "old boom", while the portions of boom marked in red above and below, were new booms, and that he had built the new booms under permission from the Government.

The map was then offered in evidence over the objection of plaintiff that it was incompetent, irrelevant and immaterial and had not been properly identified, and was marked "Defendants' Exhibit "G".

(Testimony of A. H. Powers)

Witness then further testified that he caused this map to be made, was familiar with the place and location which it purported to represent, and from his own knowledge knew that it fairly accurately represented the old creamery boom; that, over plaintiffs' objection as irrelevant, incompetent and immaterial, at the time the additions were built to the old creamery boom he had driven new piling in the old creamery boom and had put in lots of new boom sticks and new chains the entire length of it; that in rebuilding the lower boom they drove piling the entire length of it, up the middle of the channel; that they blew out the dolphins as requested by the Government and rebuilt the boom, practically entirely, with new piles, boom sticks and chains and extended it according to the permits that he received from the Government; that in the lower boom we put in about five dolphins and are using part of about three of the old dolphins, which they had re-inforced with new piling and replanking; that they built one large dolphin at the head of the Creamery Boom and some small clusters of piling at the foot of it and reinforced all of them with new piling, chain and boom sticks, and that they were not using any old dolphins in the upper boom as they had blown them out pursuant to the Government's orders, with dynamite; that for the upper boom they built an entirely new sheer boom, 860 or 880 feet long, and the old sheer boom they towed out of the road and tied opposite the boom at the Cutoff, as it was of

(Testimony of A. H. Powers)

no use for a sheer boom, and it is lying there yet; that the Cutoff was the name of a place where the channel of the Coos River had cut across in to Catching Slough and was situated at the upper end of the new Creamery Boom; that they made two entirely new sheer booms for the lower boom; that one sheer boom had been rebuilt, rechained and widened and most of the poor sticks taken out, but that there were a few sticks that were in the old sheer boom, in the boom.

Witness further testified that he was familiar with the amount of logs that came down Coos River and had come down it since his purchase of the boom, and that the old boom was too small to handle the logs; that at least four or five million more than came out in two different seasons than the old boom could have held if it had been in condition to hold them, but that it could not have held them anyway for the reason that after they had reinforced one of the sheer booms and put on several lines across the river it broke in two and let the logs out in to Coos Bay; that none of the boom would have held as they had two pretty good-sized freshets since the winter of 1907 and 1908.

Witness further testified that he was familiar with the life of piling of different kind in and around Coos Bay and on other water, and that a great majority of the piling of the boom was practically worthless down to the water line,—that is, an average high

(Testimony of A. H. Powers)

tide; and that when freshets came the water raised two or three feet more, and during such freshets as subsequently occurred, the boom sticks at high tide would come up on the rotten part of the piling and it would not hold; that the piling had never been sawed off sloping or coated with tar at the top, which would have made it last a great many years longer; that at the time he purchased it, witness would say most of the piling looked to have been driven from 15 to 25 years; that an occasional pile had been driven in the boom for repairing it that looked as though they had been driven there two to ten years; that the boom had been fixed up—they had broken out and rotted out and been reinforced by somebody; that the piles were mostly of second growth fir and would average from 14 to 20 inches at the butt; and that piles of that character, not shaped or protected at the top in use in a situation similar to that at the boom, would get very doty and lose their strength after ten or twelve years, especially if they had been busted on the top with a hammer, as these piles were.

Over objection of plaintiffs that the same was incompetent, irrelevant and immaterial, witness further testified that he had been compelled to purchase considerable land before the Government would grant him any right to build the booms, and over the objection of the plaintiffs that it was incompetent, irrelevant and immaterial, the witness testified that

(Testimony of A. H. Powers)

he had purchased tidelands of the Coos Bay Tideland Company in order to build the lower boom, and had paid therefor \$7,155.00; that he was familiar with the price of tidelands similarly situated and that this price which amounted to \$50.00 per acre, was a reasonable one and that the adjacent tidelands of the same character and nature had since been sold for \$100 per acre; that he had also been compelled to buy what is known as the Holland Island, which was marked "Island" in plain white and then underneath it, the word "Holland" in plain white, the defendants' Exhibit "A"; that this was bought because the tidelands in front of the island had been cut out and washed away so that the tide land bought from C. A. Smith had washed away from in front of the Holland Island for about 400 feet, and Mr. Devers, the owner of the Holland Island, objected to the Government against the witness having a boom in front of his property, and witness had purchased the island from him for \$2250, which he thought was about the same price as the average price of tide land close to this property and that he had to have the island in order to hold the boom.

Over objection of plaintiffs that it was incompetent, irrelevant and immaterial, witness further testified that he bought the McIntosh lands and another piece of land from C. A. Smith at the upper boom, known as the Creamery Boom; that this purchase was made because part of the old boom and also where he wished to extend the new boom was in

(Testimony of A. H. Powers)

front of the McIntosh property and that at the time of the original purchase he did not get any land bordering on the Creamery Boom; that he paid \$3,200 for the McIntosh land and the boom rights on the other side of the river, which price was about the average price of the adjacent land; that in connection with riparian rights on the other side of the river he was compelled to purchase a fishing right from Alvin Smith, Mr. Gage and Mr. Farrin, for \$1,750; that at the time of the purchase these parties had brought a suit against him to enjoin erection of the boom.

Over objection of plaintiffs that it was incompetent, irrelevant and immaterial, witness further testified that about \$30,000 had been expended altogether for land and improvements upon the boom since he purchased it and that including the \$2000 originally paid for it, the total expense was \$32,000. that the improvements upon the boom had to be made in order to handle the logs, and that in witness's judgment it would have been necessary for anyone endeavoring to handle the business through that boom that had come to it since the purchase, to have made the improvements and expended the money he had made and expended in so doing; that there was no doubt but that it would be necessary; that they could not have made the improvements without first buying the lands and that the Government would not have issued him a permit unless he owned the riparian rights.

(Testimony of A. H. Powers)

Witness further testified as follows:

“Mr. Squire introduced me to Mr. Bernitt the first time I remember of seeing him some time in July, 1907, and Mr. Bernitt and I went, and Mr. Squire went, over to the boom and went around over it. Mr. Squire had told me that Mr. Bernitt always had done the rafting for the Dean Company since he had been there and he considered him a good raftsman and he wanted to know if I would make a deal with him for to do the rafting this coming year, so we went over and looked over the booms and I told Mr. Bernitt that I would be glad for him to go ahead and handle the boom that year just as he had been handling it the year before, that we didn't have very many logs in the river of our own and that I wasn't prepared to do the rafting at that time.

Q. What did he say?

A. He said he would go ahead and do the rafting.”

Witness then further testified in substance that Mr. Bernitt caught the logs that season and did the rafting and put the logs in to the boom; that it took quite a while to get the logs out of the boom; and that the people who owned the land on the north side of the channel made strong objections on account of the time that the channel was blocked and brought suit for damages; that the suit brought against witness was for \$10,000 and that witness took the matter up with Mr. Bernitt, Mr. Simpson and some of the log owners and settled it for \$1,000; that during

(Testimony of A. H. Powers)

the time he received several letters from the Government, ordering him to keep continually at work and open the channel and asking why he could not fix his booms so as not to obstruct the channel; that at different times witness went over and told Mr. Bernitt that there was so much kicking about the channel being blocked that he wished he would hurry matters as fast as he could; that at the time Mr. Squires introduced him, witness told Mr. Bernitt that he could do the rafting the same as he had done it previously; that he didn't think they talked about the price, but Mr. Squire had told witness about the deal that the Dean Company had with the rafters; that the price was 60 cents per thousand, 12½ cents boom rental, 12½ cents for catching the logs and 35 cents per thousand for towing and delivering, while the piling went at a quarter or a half a cent a foot, and settlement was made at the end of the year on that basis.

Witness further testified that the following summer, in June, he took Mr. Varney and a crew of men over there and started them at work driving piles and cleaning out the dolphins, and other work that was to be done under the Government instructions, and that he placed Mr. Varney in charge of the booms, and visited and looked after the improvements himself and that Mr. Bernitt and Mr. Wittick were not there and did not aid therein; that the men tore out the old, rotten booms and piling and dolphins, and stuff that was in their way, and Mr. Varney remained

(Testimony of A. H. Powers)

in charge until about the first of January, when it was placed in charge of William Ingram, who also made repairs every year; that the wear and tear on the boom is great; that on the 18th of July, 1912, he went over the booms and counted the piling as close as he could, both the new and the old, that was in use, and at that time made a memorandum thereof, and using the memorandum to refresh his memory, he further testified that there were 121 old piling and 768 new piling in use in the lower boom, and 159 old piling and 610 new piling in use in the upper or Creamery Boom; that there were a considerable number of old piles in the boom and away from the boom at different places at both booms that were not in use, but that he counted all the piles that had some strength in them and were not rotted out, that were of service to the boom that was in there; that you could tell whether a pile was driven ten, fifteen or thirty years ago or whether it had been driven in the past five or six years, and that he called one driven within the last five years a new pile, and that one that had been driven from seven to ten years or longer, he called old piles; that there were lots of them that had been driven probably fifteen of twenty years, but that if there were any doubt about a pile he called it an old one and was on the safe side in his statement; that there were lots of times that he did not go right to the pile, but examined it at 100-feet distance; that there were probably 75 old piles on the Creamery Boom that were

(Testimony of A. H. Powers)

standing there all rotted and practically out of use, but that he didn't count, and that there were several rows of piles in back from the river on both sides of the boom that were entirely away from the boom now, as the river had been filled up, so that they were of absolutely no use to the boom and that those he did not count; that where they had placed a new pile beside an old pile that was rotten, the new pile would take the place of the old pile where it would not be safe to leave the boom without having a new pile; the old pile was not counted as the boom would have been just as good without the old pile; and that he counted the piles and all of the dolphins; that after the season of 1907-1908 and after they had worked a week or two in piling the new booms over in the north channel, Mr. Bernitt met the witness one day in Marshfield and told him that he was spoiling the boom, saying, "You can never catch logs in that channel if you split the channel with the boom down the center." To which witness had answered that it was not a question of spoiling, but that it was a question of what he had to do or he could not have a boom there; that Mr. Bernitt and the witness went over to the boom and Mr. Bernitt still told witness that he was satisfied that they could not use it as a boom and that we could not catch our logs in the channel and split it.

Witness further testified that by splitting the channel would hold about half as many logs and that for that reason they had to extend the boom below.

(Testimony of A. H. Powers)

Witness then testified as follows:

“About a week or ten days afterwards, one of my men that was working over there,—I don’t remember whether it was Mr. Varney or whether it was a fellow by the name of Wickman, said that Mr. Bernitt had told him that I was spoiling the boom, and that he had an interest in the boom, and that was the first time,—I think that was in the month of August—that I had ever heard from anybody that Mr. Bernitt or anybody else claimed any interest in the boom; so the first time I met Mr. Bernitt that I remember that I met him after that, I talked with him about it, and he said that he did claim an interest in the boom. I told him that I had bought the boom from C. A. Smith and that I did not know him or anyone else was interested in it, for I had bought the entire interests when I made the deal; and he made some little talk about it—I can’t remember just word for word. So I spoke to Mr. Mereen, the General Superintendent of the Manufacturing Company, and told him that I was talking to Mr. Bernitt a short time ago and he had given me to understand that he claimed an interest in the Coos River Boom. So about a week or ten days after that Mr. Mereen and me were going up the river and we met Mr. Bernitt just back of Mr. Eckblad’s store, there at the boat landing, and I called Mr. Bernitt over and told Mr. Mereen, and I introduced Mr. Bernitt to Mr. Mereen, and Mr. Mereen told Mr. Bernitt that he didn’t,—as far as they were concerned, they did not know

(Testimony of A. H. Powers)

Mr. Bernitt in the deal and that they didn't recognize Mr. Bernitt or anyone else as having an interest in that boom, as he understood C. A. Smith bought the entire interests from the Dean & Company. Then the next time I met Mr. Bernitt about it was the first time that I ever remember of seeing Mr. Wittick. Mr. Bernitt and Mr. Wittick, Mr. Goss, Mr. Oren and myself that fall—I think that some time late in October—had a meeting over in the Company's office and we talked over this boom business and I told Mr. Bernitt at that time the same as I had told him before, that I had bought the entire interests; that I, as the Smith-Powers Logging Company, had bought the entire interest in that boom from C. A. Smith and that I couldn't think of having any partners in the boom business; that I was prepared to do the rafting myself and was rigging up for it; that there had been so much objections the year before in regard to delays for the logs, that I wanted to be in shape for to raft and do that kind of work myself; I also told him that if at any time I wanted anybody to work, to hire anybody by the days' wages or anything like that, I would be glad to give them a job the same as anyone else, whenever I needed a man. That was in the presence of the gentlemen that I have just named over".

Witness further testified that he did not remember of ever having conversations with Mr. Wittick in regard to the boom work, except at that time, and that that time at the office was the first time he had

(Testimony of A. H. Powers)

ever seen Mr. Wittick; that thereafter witness went right ahead and did the rafting; that Mr. Gould had some logs up at Allegany that Mr. Bernitt was going to raft, and Mr. Gould asked witness if he had any objections to Mr. Bernitt's rafting them, as it would be cheaper for him than to have them go through the boom; that witness told Mr. Gould by all means to get them to the mill the cheapest way, and thereafter Mr. Bernitt went up to Allegany with some boom sticks, but the freshet came on and some one sent word that they could not hold the logs and Mr. Gould came down himself and asked witness if he had any objections to Mr. Bernitt's rafting the logs over to the mill and if he would let them go through the boom, to which witness had replied that if he took the logs through at once and allowed witness the boomage for going through the booms, there was no objection; that when they sent word that the logs were coming, witness went over to the boom himself, stayed there with the men and caught the first bunch of logs that came in and had his foreman come over and start rafting out from the lower end of the boom, before he saw Mr. Bernitt at all; that there was more of a freshet and that Mr. Bernitt stayed up at the sheer and watched the sheer where the logs were coming in; that witness told him to stay there and see that no logs got by, and that he and either one or two men, stayed there.

Witness further testified that he employed other men and gasoline boats and helped handle logs over

(Testimony of A. H. Powers)

there at that time; that he had several boats working for him and he kept track of the rafting that the plaintiffs or other men did at the boom during that season; then he had the foreman of the boom keep track of the rafts that the plaintiffs took over and the time that the plaintiffs worked at the boom.

Witness was then shown a paper which he identified as a statement of the times and amount of work done by the plaintiffs in helping raft logs over the boom, the price being the same or a little more than was paid to others for the same kind of work; that this was taken from the reports of the men at the boom, made every night, or while witness was away, reported in every three or four days.

Witness stated that this statement was made from Mr. Ingram's books, which were books of original entry but that he could not find the book it was taken from; that the statement was made right after the time that the work was done and had been in the attorney's office for a couple of years; that the witness had tried to find one of Mr. Ingram's books that had a statement in, but could not find the same; that they had one book but could not get the other; that the Smith-Powers people were looking for it but could not find it.

Whereupon said statement was received in evidence over the objection of the plaintiffs that it was incompetent, irrelevant and immaterial, and not an account of original entry and was marked Defendants Exhibit "H".

(Testimony of A. H. Powers)

Jan 21	Wittig and one man took Raft to Simpson	\$15.00
Jan 22	Burnett and 2 men watched Boom	10.00
Jan 23	Burnett and 2 men watched Boom	10.00
Jan 24	Burnett one Boom to Simpson	15.00
Jan 25	Burnett one Boom to Smith mill	15.00
Jan 27	Burnett one Raft to Simpson	15.00
Jan 28	Burnett took one Raft to Smiths	15.00
Jan 29	Burnett took Raft to Simpson	15.00
Jan 29	Burnett took Raft to Smith	15.00
Jan 30	Burnett took Raft to Simpson	15.00
Feb 3	Burnett took Raft to Simpson	15.00
Feb 5	Burnett took Raft to Simpson	15.00
Feb 8	Burnett took Raft to Simpson	15.00
Feb 10	Burnett & Wittig each took one Raft to Simpson	30.00
1909		

(Testimony of A. H. Powers)

Upon further direct examination witness testified in substance that the original entries were in the time books kept at the boom, but that he himself had made entries therein at different times when he was over there; that the plaintiffs closed the boom, went and watched it two or three days, and outside of three hours work, the balance of the time they towed rafts and emptied them in to the booms at the mill; and towed back the boom sticks; that some of the time the Smith-Powers Company had a full crew of men at work on the boom,—six or seven men who made up the rafts just as the boats could tow them away; that neither of the plaintiffs had charge or control or managing of the boom at all, and witness notified them to make out their bills for the work they had done and notified the Simpson Lumber Company not to settle with them for the rafting, as Mr. Simpson had told witness that plaintiffs wanted him to pay them for the logs they had delivered to the Simpson Lumber Company; that Mr. Simpson stated that he had paid plaintiffs something over \$600.00 and deducted that from the Smith-Powers account when settlement was made for rafting, and this \$600.00 was consequently credited on the Smith-Powers books as against the services the plaintiffs had done there on the boom in rafting; that, over objection of plaintiffs that the same was incompetent, irrelevant and immaterial, at the time of the purchase of the boom, Mr. Smith had Mr. Sherwood and Mr. Coke go over all the

(Testimony of A. H. Powers)

titles and told witness that he had an absolute title for this property and that he would give the Logging Company a warranty deed to it, which last statement plaintiffs moved to strike out as hearsay.

Witness further testified that since the time last mentioned, the plaintiffs had performed no services and rendered no work in connection with the boom, except that possibly Mr. Bernitt might have towed a raft now and then or given them a little help, but that the plaintiffs rendered no regular services in connection with the boom.

Over objection of plaintiffs that the same was incompetent, irrelevant and immaterial, witness further testified that on account of the growing size of the Cut-off heretofore mentioned and the strong current going towards the Cut-off, the logs are drawn to that side of the river and run into the boom without using the sheer; that they had a heavy boom in front of the Cut-off and that the old sheer is tied up there out of the way, and there is a sheer over 800 feet long that is dropped on that side when they filled the upper boom; that there is a drawing tendency for the channel of Coos River to cut off and go through the Cut-off and leave the boom on one side, in which case it would be necessary to pile it and build big sheer booms there in order to get the logs in to the boom at all, and furthermore, if the main channel of the river went through the Cut-off, the north channel where the boom is would shoal and fill up; that the revenue from the boom depends directly

(Testimony of A. H. Powers)

upon the amount of logs handled through it and there are less logs being cut on Coos River now that come in to the boom, that in years previous; that, over plaintiff's objection that the same was incompetent, irrelevant and immaterial, there were less logs in that year (1912) than there had been for the past five years; that witness was familiar with logging operations being carried on on Coos River and was interested in some of them and according to the present plans and prospects there will be a great deal less logs cut on Coos River in the next few years than there had been heretofore; that there was but one camp cutting logs on Coos River that would come through the boom in the next year, and that operations at that camp were nearly finished; that two camps had discontinued operations on the river and that witness knew of no logs that would be put in Coos River after that year, except those that would be landed in tide water and then directly to the mills without going through the booms, except when in cases of freshet when the water became too swift to handle rafts, at which time the logs might be put through the boom; that after that year witness knew of no camps that would be putting in freshet logs on the river; that McDonald & Vaughn had a railroad and tide water from their Daniel's Creek camp and towed their rafts directly to the mill.

Witness further testified that he told the plaintiff, Bernitt, to make out his bill and also dictated a letter to him to send his statement in to the office but had

(Testimony of A. H. Powers)

never received any bill and did not think he made one out; that Mr. Bernitt was mistaken in saying that witness claimed to be representing the Smith Lumber Company, as witness never represented anything but the Smith-Powers Logging Company since he had been in Oregon and was so introduced to Mr. Burnitt by Mr. Squires.

Witness was then asked the following question:

“Q. Mr. Bernitt has testified about his conversation at this time when you were looking over the boom, in answer to the question, “Did you tell him of your claim or interest in the boom,” as follows: “Well, he said it himself, that Mr. Smith wanted him to take that boom and this logging concern over, I believe, but he said that he would not do it as long as Wittick and I were interested in it,—do you remember any such conversation?”

to which he made the following reply:

“A. There was never any such conversation as that took place.”

Witness further testified that he did not know there was any person by the name of Wittick at that time; that during the first winter he paid the plaintiffs the same as they had always received before; that he spoke to Mr. Burnitt about Devers claim and that Mr. Burnitt said he would stand his proportion of the settlement, whatever was right and fair, and as witness remembered, it was \$50.00 or

(Testimony of A. H. Powers)

such an amount, that he paid; that witness was present at the conversation one Sunday morning between Mr. Burnitt and Mr. Mereen, in which Mr. Mereen had stated, "I understand that you and a party in North Bend claim a half interest in that boom over there," and at which Mr. Bernitt said that Mr. Mereen further stated "that that was no way to have it; that they should own it all or none"; and that Mr. Mereen did not make this latter statement but did say that they did not recognize anybody in that boom, that it was bought from the Dean Company by Mr. Smith, as the other property was at Marshfield and that it was sold to the Smith-Powers Logging Company.

Witness then further testified that at the time the boom logs came he opened the boom himself and that he never saw Mr. Wittick around the boom at any time since; that he had seen him passing up and down the river and towing boom sitcks; that Mr. Burnitt and his men did watch the boom few days and that at that time the sheer boom would be swung over from the dolphin in order to allow large boats to go by, up or down the river, as the river had filled up so much behind the dolphin that it was very shallow at low tide even in the freshet, but that since they had built a new dolphin it was no longer necessary to do this; that witness had told Mr. Burnitt over in the office in October, that any work from that time on that he would do around the boom or in rafting logs, witness would pay him for as he would any

(Testimony of A. H. Powers)

body else for the same kind of work if plaintiffs wished to work any at towing and delivering logs after that; that in 1908 witness had several conversations with Mr. Bernitt about splitting the boom in two, and Mr. Bernitt said it would spoil the boom.

Witness then testified as follows:

“I remember that Mr. Bernitt spoke to me again within a day or two before the time that we went over to the office in regard to his interests in the Coos River boom, and I told him that if he claimed an interest in the Coos River boom the best thing to do was to get Mr. Wittick that he had claimed had an interest in it also, and go over to the office and would take it up with them and see what his interest was, or something to that effect. In the meantime I had went over it with Mr. Squires and other men, trying to find out if Mr. Bernitt or Mr. Wittick had any such interests as he claimed, and from all information that I could get from Mr. Kruger and other people here on the Bay, I was told by practically every man I asked of Mr. Bernitt’s interests was just doing the rafting for the different parties and paying 12½ cents a thousand boom rental to the Dean Company for the use of the booms, and that is the only way and all the information that I could get from other raftsmen or from anybody that I could inquire from, also from the Simpson Lumber Company. I made the same inquires from Louis Simpson, and he had told me that these raftsmen here had been doing the rafting for them ever

(Testimony of A. H. Powers)

since he had been on Coos Bay and he knew that there was 12½ cents a thousand went to the Dean Company for the use of the boom from the Simpson Lumber Company; and I couldn't find out any further and took the matter up with the Merchant boys, and I couldn't get anything from them, only in the same manner."

Whereupon plaintiffs moved to strike out all that portion of the relating to what witness was told by persons other than the plaintiffs, for the reason that the same was hearsay.

Witness then further testified that in his opinion if all the piling that was driven there in the places where it could be used, and all the chains and booms and everything was new at the time he purchased it, he should think it would cost about \$9000.00; but that the entire structure, from one end of it to the other, with the exception of a few scattered piling that had been driven possibly in the last 5 or 6 years, he would not consider it worth to exceed \$500.00 actual value towards the boom now there; that in view of the rulings of the War Department and what was subsequently required of him before granting him a permit to build the boom, was really not worth a dollar to him without any land or riparian rights to go with it, and that if he had had riparian rights and had been required by the Government to make the changes that were required under the permit, the boom as it then was, even if it were new, would have been worth probably \$2500.00 or \$3000.00.

(Testimony of A. H. Powers)

Upon cross examination, the witness then further testified in substance that he never consulted the plaintiffs with regard to the extensions or the expense of improvements on the boom; that he came to Coos Bay in February, 1907, to look over the timber and how to handle the logs and to form the company known as the Smith-Powers Logging Company; that he then visited the booms in question, but did not get off the boat; that he thought they went part of the way through the north channel, but would not say that they got clear through, and that it seemed to him that there were some logs there at that time, though he did not remember of seeing anybody working there or any rafting gear there; that he then saw some logs there, either in rafts or loose; that the C. A. Smith Lumber Company's Bay City mill was then running part of the time, but that he didn't know whether any of those logs were for that mill; that the mill was depending on the Cunningham camps for their entire output; that the witness knew nothing about logs being caught on those booms during the spring of 1907, but that they caught logs during the season of 1907 and 1908; that there were a few feet for the C. A. Smith Company and the balance for the Simpson Lumber Company and there may have been a few for the North Bend Lumber Company; that he did not think there were any logs lost that year, and that there was some little work done two or three days or such a matter, by the plaintiffs, on the boom; that the Smith-Powers Company took

(Testimony of A. H. Powers)

their pile driver over there and drove some piling in the Cut-off, and the plaintiffs moved out the Smith pile driver there for a day or two; that since he had had charge of the boom he had taken the pile driver over there once to do repair work outside of the building, and extensions, etc. that the only new piling that he knew of that had moved since it was put in was one broken by tying rafts to it and the damage done by the big freshet when it went over the tops of the dolphins behind the piling there that was in the dolphins; that outside of the rebuilding of the old sheer booms, the witness had not renewed any chains since he rebuilt the boom, but had put in new staples where some of the chains had pulled out; that one or two of the sticks had broken and that the waves of passing boats loosened the planking so that they had to go over the booms there and renew planks and spike them in; and they have to be looked after very carefully every year in order to keep the boom up; that at the time he examined the boom in 1907 it appeared to be an old, dilapidated thing that had about outlived its usefulness; that in his statement of the old and new piling he had only counted such old piling as had been incorporated in and used in the booms as reconstructed, and did not count any piling that was in the old booms and was not in use now; that on the east side of the north channel there was some piling and there were boom sticks along most of it,—most of the way; that the witness thought they were broken in one or two places; and that in making his count,

)Testimony of A. H. Powers)

witness did not consider the row of piling on the east side of the north channel as a part of the boom, but he counted the good piling there in; that he did not count the piling at the lower end of the boom,—the old boom, in the north channel, as they had to blow out most of the old, and what old ones are now in use the witness did count; that the new pocket that witness had built would hold many more logs than all the booms in the channel today,—both upper and lower booms; that the new upper boom would hold about a million more than double what the old boom would hold; that the old upper boom would hold about 2 million and a half in average logs,—that is about 2500 logs with a thousand feet to the log; and the present upper boom would hold close to six million; that the upper boom was in a swifter current and the logs would pile up more there, and would hold more in proportion than the lower boom; that the lower boom, not including the pocket, would hold about three and a half million feet, if they were good-sized logs run in on high water and packed tight;

Witness further stated that he was familiar with the manner in which the old boom was operated before he took possession, and that it would hold 6000 logs or six million feet of good-sized logs, when operated in the old manner with the old booms together would about seven million; that he had a very good idea of what they would hold by what he had scaled in and scaled out of them; that the present

(Testimony of A. H. Powers)

booms would hold about sixteen million and that he had enlarged the booms more than 100% without storing logs in the channel at all; that in counting piles he had included all the piling which he claimed to have put in to the extensions and in to the old booms; that he inspected the booms several times during 1907 and that they settled on the price of the booms for the Smith-Powers Company some time that month or the month of August; that the first time witness remembered seeing Mr. Bernitt was in July or August of that year, but witness was unable to state whether it was before or after the price of the boom had been agreed upon; that he thought Mr. Oren, the manager of the Manufacturing Company, was charging more than the stuff was worth and the price was not settled for some little time; that no writing was executed between them,—between C. A. Smith and the Logging Company, and that the boom was charged to the Logging Company on the books of the Manufacturing Company; that at the time witness first met Mr. Bernitt nothing was said about the ownership of the boom; that at the time witness met Bernitt in July, 1907, nothing was said about the ownership of the boom.

Witness then further testified as follows:

“At the time I met Mr. Bernitt, Mr. Squires, who had been the former manager of the Dean Company prior to the purchase of the Dean Company’s interests by C. A. Smith, he introduced me to Mr. Bernitt and told me that he was the raftsmen that had

(Testimony of A. H. Powers)

been rafting their logs, and had also told me in the way that he was paid for the rafting, and I went over it with Mr. Bernitt and I told him as we didn't have many logs coming and wasn't in shape to do any rafting, that if he wanted to do the rafting the same as he had done it other years, that Mr. Squires had told me that he was a good, competent man to look after the rafting, and I told him he could go on and look after the booms and do any repairing that was to be done on it and do the rafting the same as he had done theretofore, and he said he would''.

Witness further testified that he understood from Mr. Squires what the arrangement was and that in the fall of the year, Mr. Bernitt told him the price the same as Mr. Squires had; that is they had $12\frac{1}{2}$ cents for catching the logs, 35 cents for rafting and delivering them and that $12\frac{1}{2}$ cents for the use of the boom that went to the Dean Company; that Mr. Bernitt had never mentioned Mr. Wittick's name to the witness that he could remember that fall, and he had never heard of Mr. Wittick until the time they were rafting over there and that witness understood from Mr. Bernitt, just the same as he understood from Mr. Squires, that there was $12\frac{1}{2}$ cents per thousand went to the Dean Company for the use of the boom and that was the only understanding that he had with Mr. Bernitt or Mr. Squire; that witness understood that $12\frac{1}{2}$ cents per thousand for the logs that went through the boom for the spring of 1907 and the winter of 1907-1908 was credited

(Testimony of A. H. Powers)

to his company; that Mr. Brown looked after the bookkeeping and said that he had straightened it out satisfactorily with Mr. Bernitt; that witness thought the $12\frac{1}{2}$ cents per thousand was paid by the mills, the Simpson Lumber Company, the Smith Company, and he understood that Mr. Bernitt got the other $12\frac{1}{2}$ cents for catching the logs; and witness did not know whether Mr. Wittick was hired to help Mr. Bernitt or anything about it; that if the Simpson Lumber Company had rendered any statement showing the credits for boomage on the logs for the years previously mentioned and that these credits were distributed $12\frac{1}{2}$ cents to the Smith-Powers Company, $6\frac{1}{4}$ cents to Mr. Bernitt and $6\frac{1}{4}$ cents to Mr. Wittick, the witness would have known of it if he had looked it up; but that a great many of these details are left to the bookkeeper who had been with the company a great many years and in whom he had the most absolute confidence and that he did not personally know of any such statement; that logs that went through the boom in the fall of 1907 and spring of 1908 were mostly for the Simpson Lumber Company; that witness was there at different times and he understood that Mr. Bernitt was doing the rafting for the Simpson Lumber Company; that the first time he ever heard Mr. Bernitt's and Mr. Wittick's names mentioned together in connection with the boom was in the summer of 1908; that in making the extensions to the booms the witness had blown out some dolphins and other piling and where

(Testimony of A. H. Powers)

any of the old work in any way interfered with the extensions he took that out too; that some of the requirements of the War Department were written communications and at least a half a dozen times Government officials came to him; that he had some correspondence and remembered in particular two very severe letters he received in the summer of 1908, stating that if he did not immediately get this boom in shape so as to split the channel, they would force him to do so or prevent him from using the main channel for logs for the coming season; that Captain Polhemus, Major McIndoe or Colonel Roesley had notified him that something must be done but that he could not say whether he had saved any of the letters or not; that he thought he had started to make the extensions in July or the 1st. of August, 1908, and that he began to make the extensions on the creamery boom in 1910; that during the summer of 1908, he had stored about 1,800,000 feet of white cedar in the creamery boom and he used that boom very little in booming and rafting operations during 1909, merely running some rear logs in to it when the other booms was filled up; that all of the creamery boom was dry at low tide, excepting about 150 feet running from a point across the boom at the upper end; that in ordinary low tide 95% of the acreage of the old boom was out of water; that he now had some logs in the old creamery boom and that they still used portion of the old lower boom; that when witness first went to the boom he found lots of boom

(Testimony of A. H. Powers)

sticks and sheer booms connected up with just such chain as defendants' exhibit "X", which was some of the chain; that he would say there was probably one third of the entire amount of chains on the boom was in as poor condition as the sample; that in some instances there were other chains put on that were in better condition, and in others, boom sticks were coupled together with just such kind of chain which you could pretty nearly break in two with your hands, and that that was the reason the booms were breaking all the summer and sticks falling out and turning around; that this particular piece of chain was taken in part off the sheer boom and part hanging to the old boom sticks on the shore line on the inside of the south channel; that these exhibits were got in July 18, 1912, and that the repairing that appears on the booms were made in the summer of 1908;

Witness further testified that he had a pretty good idea of the life of chains of that character in waters such as those at the boom and that they were not safe to hold logs or hold boom sticks for more than 8 or 9 years, but that the largest sized chain might have been on there twelve to twenty years to get into the condition it was in.

Witness further testified that the past nineteen years he had been going over a great many booms and rafting works all along the Pacific Coast, every season since 1893, and that he looked over things very closely to get all the information he could from the different owners of booms and rafting works

(Testimony of A. H. Powers)

in regard to the length of time the different material, both in piling and chains would last, but that he had had only a little over $5\frac{1}{2}$ years of actual work on salt water himself; that these trips had taken him from British Columbia to California, and had been for the purpose of looking over timber and logging operations and figuring out costs of construction, etc. that he thought he was in a position to know the average life of piling in waters such as those of Coos Bay, and of boom sticks; that when he took charge of the boom they built one entire new sheer boom one log, one length of sticks, he thought, and quite a lot of cross pieces and chain on others; that the sheer boom that broke was on the south side of the lower boom, but that he didn't remember Mr. Bernitt ever calling his attention to its condition, although Mr. Bernitt had told him that there was some fixing to do on the boom before it would be in shape to catch the logs, but that he did not remember Mr. Bernitt asking him for ninety-foot sticks to reinforce that sheer boom; that the witness had called Mr. Bernitt's attention to the condition of the whole boom and he had said "yes,"—he knew that it needed repairing; that witness did not know the number of piling in the old booms at the time he took possession; that the new sticks that he put in to the boom were from 15 to 24 inches at the top or small end, and as high as 32 to 34 inches at the butt end and some of them a little larger, and were all lengths,—60, 70 or 80 feet, and that in rebuilding the side booms he had

(Testimony of A. H. Powers)

used all lengths of logs from 40 feet up; that the length of boom sticks,—the best length to use, depends entirely upon the place you want them, that in some places where you have rough seas and high winds you cannot use long sticks: that he had rafted in places where you could use no sticks longer than 20 feet and in other places where you could use them 100 to 140 feet long; but as far as the booms in controversy were concerned any length of sticks that a person desired could be used, only the longer the sticks the less chain you will have to use and the less boring of holes to put the chains in; that the market value of long sticks as a rule is more than short ones; that he had had the tops of all the piles cut off so that they sloped, and tarred them, but that none of them had been cut too low; that they had 22 foot freshet in South Coos River in 1910, but neither the highest freshet or highest tides had brought the water over the tops of the piling cut off; that in making the \$1000.00 settlement with Mr. Devers he did not know whether Mr. Wittick contributed anything, but that certain sums were collected from the Simpson Lumber Company and Mr. Bernitt and others to make this payment and that Mr. Brown, the bookkeeper, looked after it; that the Smith-Powers Logging Company contributed the same amount per thousand to the settlement as the Simpson Lumber Company and that he understood that Mr. Simpson had said that he would get his loggers to stand ten cents per thousand.

(Testimony of A. H. Powers)

Witness further testified that at that time there were some old logging deals and Fred Noah had some and Dan Steinon had some logs that had been bought for the Dean Company, and the Smith Company, in buying out the Dean Company, took over these contracts; that the Smith-Powers Logging Company was not at that time logging on Coos River; that they had a few logs in the boom and paid their proportion toward the above settlement and if Mr. Wittick contributed to that fund he knew of it, that Mr. Bernitt told him he would; that Mr. Varney was placed in charge of the booms in July 1908, and in answer to the question as to whether he was to maintain exclusive possession of it, witness said he was instructed that he should build the booms; it was in the summer time, there were no logs in the booms, and he built the boom under witness' instructions from the blue prints he had received from the War Department; that Mr. Bernitt stated, with reference to the splitting of the channel or the lower boom, that the witness was spoiling it, but neither Mr. Wittick nor Mr. Bernitt ever said anything about paying for the expense of repairing the boom; that the first witness heard of Mr. Bernitt's claiming an interest in the boom was from one of the men working with Mr. Varney and Mr. Wickman, who stated to witness that Mr. Bernitt had told him that they were spoiling the boom and that Mr. Bernitt had an interest in it, or something to that effect; that witness saw Mr. Wittick in Marshfield at the beginning of the logging

(Testimony of A. H. Powers)

season in in the fall of 1908, and was there introduced to him by Mr. Bernitt, and saw him frequently thereafter in the fall of 1908 and the Spring of 1909; that Mr. Wittick then helped take several rafts from the boom over to Simpson's or up to Smith's and both he and Mr. Bernitt were there with boats and took the rafts away as they put them up; that they were taking the logs for the witness who had told Mr. Wittick and Mr. Bernitt both that if they wanted to go to work any time for him he would pay them the same as he would any one else and would give them work any time he had worked for them and talked to them about doing the work in October, 1908; that the statement, (Defendants' Exhibit "H") is a credit that was made to both Mr. Bernitt and Mr. Wittick; that witness thought it was Clarence Gould who telephoned about the logs coming down; that witness was sure Mr. Wittick did not telephone and that Mr. Bernitt may have talked to him or telephoned to him, for there were half a dozen messages about those logs; that he did not remember particularly about Mr. Bernitt's telephoning to them, but he was pretty certain it was Clarence Gould, and that a small freshet started after Mr. Bernitt went up to raft some logs at Allegany and he did not know but that the logs would break away and he would have to turn them loose and they telephoned witness in regard to catching them.

Witness then testified as follows:

"I think that Mr. Bernitt, after we had caught

(Testimony of A. H. Powers)

the logs, about two or three days, it seems as though after he had caught the logs we got part of the logs that was coming in the rush; he came down with his sticks and I remember him saying to me, 'What are you rafting them logs over for to Smith's mill or some such thing as that. Why, I says, we started to raft them logs there because we wanted the logs over at the mill. They had made some arrangement with me whereby if just those logs came that they could use the boom for so much a thousand for to raft them to the Smith's mill. Mr. Gould had told me some time in the summer time and asked me if I had any objections to this Mr. Bernitt doing the rafting from Allegany in place of having them going through the Coos River boom. I told him that I had no objections at all to having him have Mr. Bernitt raft the logs, for to get them to the mill just as cheap as he could, and I didn't care whether he used the boom or not, so far as I was concerned, but when them logs started to come I had telephone messages from different farmers along the river and different ones, that the logs was coming. I immediately went over and swung the booms and got things ready for the catch the logs."

Witness further testified that at that time he was there he saw no one at the boom but that when they were coupling the sheer boom together the toggle was too big and somebody came with a smaller toggle, but he was unable to say whether this was Mr. Wittick or not, but knew it was not Mr. Bernitt;

(Testimony of A. H. Powers)

that plaintiffs had no rafting gear there at that time but that Mr. Bernitt had a gasoline scow that he called "Relief," and a couple of anchor boats and lines and rigging to handle rafts with; Mr. Bernitt had two boys with him on the scow while he watched the sheer boom about 2½ or three days when the logs were running; that the boys were about 17 or 18, one of them being Mr. Bernitt's son; that when witness got the lower boom open to catch these logs he went on up the river to see about these logs but didn't stop at the upper end of the boom and didn't see Mr. Wittick there; that Mr. Wittick had a little boat and a couple of anchor boats that he used for running around with and that he pulled up on the raft, and that he had a power boat and had sticks and a raft and stuff for handling it and had one man most of the time to help him; that Mr. Wittick was not there himself; that witness only saw him there once, as he heard shortly afterwards that Mr. Wittick's boy had drowned and he was away from his work two or three weeks; that he had seen more of Mr. Bernitt and his boats than of Mr. Wittick and his boat; that witness would judge the values of Mr. Wittick's stuff outside of the boat would be \$300.00 and the value of the equipment would be approximately \$1500.00 more; that Mr. Bernitt's boat had more power and better than Mr. Wittick's, and he would say the value of the latter's equipment was \$1000.00; that there were just two men on Mr. Wittick's boat and that Mr. Bernitt had two most of

(Testimony of A. H. Powers)

the time, besides himself, and that in making up the statement (Defendants' Exhibit "H") he had taken into due consideration the number of men employed and the use of the rafting gear and everything.

On December 14th, 1912, the hearing being resumed, witness further testified in substance that he thought Mr. Bernitt had three or four sets of rafting sticks and that the Smith-Powers Company had about 18 or 20 sets; that at present witness used very little rope in rafting and he used cable for cross lines but that he thought Mr. Bernitt used rope; that he did not know how many rafting sticks Mr. Wittick had and did not know what value Mr. Wittick placed on his rafting outfit; that he did not remember when the deed by Mr. Smith and his wife to the Smith-Powers Logging Company was made, but that it was some time when Mrs. Smith was here at Marshfield, and several such matters were cleaned up; that he thought it might be March 18, 1909, as records shown him indicated, but that he really made the purchase in July or August 1907, and the purchase should appear on the books of the Company at that time, though they may have carried it on a slip of paper and entered it up long afterwards.

Witness's attention was then called to the second part and the 22nd line of defendants' Exhibit "C" showing an entry of \$2000.00 for boom, in the account for 1909, and testified that this might have been for the boom or might have been for boom material

(Testimony of A. H. Powers)

or other things; and looking over the account he noticed that surveying of the boom was paid for in September, 1907, and also where they had bought tide land; but whatever the books showed, he knew the price of the boom was settled on before he did any surveying or bought any of the tideland flats, for it was the first deal closed; that the charge of Coddington & Robinson was the first amount paid on the boom, but that witness knew that the \$2000.00 for the boom should have been on the books before the surveying; that on account of the transfers of the property not being made from C. A. Smith to the Smith-Powers Logging Company and the Smith-Powers Logging Company not having the deeded title to the land, the first permit was taken out in C. A. Smith's name, as the Government officials told witness he could have it transferred any time that the title was changed of record.

Witness's attention was called to Defendants' Exhibit "A", from which it appeared that the original permit was made on August 30, 1907, and the transfer April 31, 1911, and explained that he was in no hurry about the transfer from C. A. Smith, as he knew that there was no danger of its being transferred to any other party.

Witness's attention was then called to Exhibit "F", in reference to which he stated that it was a permit to the Smith-Powers Logging Company, dated December 26, 1908, for the extension of the lower boom on the north channel, and that this was made

(Testimony of A. H. Powers)

after he had settled the price and bought the tract of land adjoining the channel on the north fork of Coos River; that there was never any agreement between the witness and Mr. Bernitt by which he was to draw money from the Simpson Lumber Co. and it was to be charged to Smith-Powers Logging Company, or as to the crediting of the \$600.00 on the latter's account by the Simpson Lumber Company, and that in collecting for the rafting from the Simpson Lumber Company, witness was informed by Mr. Simpson that Mr. Bernitt had called on them for the \$600.00 and wished to deduct it from the bill for the logs witness had delivered during the season of 1908 and 1909; that witness's company had collected from the Simpson Lumber Company for the rafting and that he had informed Mr. Simpson that he would be responsible for the logs delivered there and that if the Simpson Lumber Company had to pay anybody else, witness would be responsible and that he had informed Mr. Simpson before any logs came down, and at least two months before any of the rafting was done, that he would do the entire rafting; that witness was positive of this because of the conversation with Mr. Simpson relative to taking an interest in the boom; that these negotiations were early in the season of 1908, and he put it off from time to time until A. M. Simpson came up from San Francisco, and that when the negotiations with Mr. Simpson fell through, witness had told him that he would go ahead and buy the bal-

(Testimony of A. H. Powers)

ance of the property, build the boom and do the Simpson Company's rafting as well as their own.

Witness then further testified that in speaking of the future of logging on Coos River he meant that the Simpson Company and the Smith Company are the only concerns at this time manufacturing lumber on Coos Bay and that he had been informed by Mr. Simpson that he would get all the logs he wanted from his two railroad camps at Daniel's Creek and Tar Heel until the Southern Pacific would come in here and then he expected to get a great many of his logs from the Ten Mile district; that the Smith people had finished all of the timber that he expected to put in the river for the next ten years and that they were building railroad to take care of the entire cut of logs; that there are many millions of feet of timber tributary to Coos River water that could be driven down by improving the streams, but that it was witness's opinion that most all of this timber would be hauled in by railroad to tide water; that probably 80% of this timber was owned by parties other than the C. A. Smith Company and the Simpson Lumber Company; that these concerns bought a few small logs of parties but that the Smith Companies would rather sell logs than buy them; that when logs come through the boom they are scaled at the mill at the time they are turned in by the mill boom; that up to the year 1911, every raft that was turned in by the logging company or delivered to the mill by the logging company was supposed to be scaled in the sticks before turning in.

(Testimony of A. H. Powers)

Witness further testified that he purchased the Holland Island containing somewhere in the neighborhood of 20 acres, for \$2500.00; that this land had a boom frontage, where the boom is now, of about 300 feet, but they had a boom privilege of about 1300 feet on the south side of the island, which was granted by the War Department, but that witness had never built this as it was not practical, without interfering with the boom already there; that in his dealings with the plaintiffs, witness aimed to allow them about the same price for their boats of the same power and with the same number of men on them; and in answer to the question of whether that price included rafting gear, rafting boats, lines and skilled service, witness answered: "Well there is not any other men on Coos Bay that furnished any sticks"; but that was up to the plaintiffs; that witness did not ask them to furnish any sticks as he had plenty of his own; that the plaintiffs used defendants' sticks fully as much as their own.

That Mr. Squires had told witness beforehand of the terms on which the rafting was done and that Mr. Bernitt afterwards gave witness to understand the same thing,—that is, 12½ cents for catching the logs, 35 cents for rafting and delivering, while 12½ cents went to the Dean Company for the use of the boom; that it all came out of the logs, including the 12½ cents, which witness understood was boom rent.

Upon re-direct examination, witness stated that

(Testimony of A. H. Powers)

the deed from C. A. Smith was dated March 22, 1909, and was recorded March 25, 1909.

Upon re-cross examination, witness stated that in answering questions regarding himself, he was answering for the Smith-Powers Logging Company.

Upon re-direct examination, witness further testified that the deal with Mr. Smith was made in July, 1907, and the price of the boom and the tide lands was then agreed upon, and at all times since witness had had charge of the boom, or possession of it, and had always considered it the property of the Smith-Powers Logging Company, from the time the Smith-Powers Logging Company bought it; that the deed from the Coos Bay Tideland Company was made December 4, 1908, and recorded December 8, 1908; that the deed for Holland Island was dated March 22, 1909, and recorded April 14, 1909; and over plaintiffs' objection as incompetent, irrelevant and immaterial, witness testified that the deed to the McIntosh land was dated February 15, 1910, and recorded May 17, 1910, and over plaintiffs' objection as incompetent, irrelevant and immaterial, witness testified that the lease was purchased from Alvin Smith and associates, December 21, 1910; that somewhere in the neighborhood of \$2000.00 was paid for this lease, and over plaintiffs' objection as incompetent, irrelevant and immaterial, witness testified the reason for making these different purchases was in order to own the riparian rights along where the boom was constructed, and over plaintiffs' objection as incompetent, irrele-

(Testimony of A. H. Powers)

vant and immaterial, witness testified that the War Department would not allow them to build the booms unless they owned these rights; that, over plaintiffs' objection as incompetent, irrelevant and immaterial, witness testified the Dean Company had never owned any of these riparian rights, connected with the upper or creamery boom, nor any land adjoining it; that the Dean Lumber Company did own some lands adjacent to the lower boom, and Mr. Smith acquired the same from it; that he had constructed booms upon or beside all the lands which he had purchased in that neighborhood, and statements of which had gone in to the report, and that it was necessary to make these purchases; that, over plaintiffs' objection as incompetent, irrelevant and immaterial, witness testified that it was necessary to purchase the Holland Island because the tide lands in front of it had washed out so that it came out to low water, and the owners had also got a permit from the Government to put in a 1300 foot boom on the south channel, and witness was forced to buy it as that boom was going to make the other boom useless as he could not sheer logs in to his own boom, if they had built the boom in the position and place the War Department had granted them permission to build it; that in making all these purchases the witness used his best efforts to secure the properties at the lowest possible figure, and had no interest other than securing them as cheaply as possible; that, over plaintiffs' objection as incompetent, irrelevant and immaterial, witness testified that the improvements and

(Testimony of A. H. Powers)

extensions to the boom were necessary to the handling of the logs that subsequently came down the river and were so made as to form an integral part of the boom; that the Cunningham logs heretofore mentioned in his testimony came over a railroad branching off of the Southern Pacific; that they could not come through the Coos River Boom as they are run in to the mill boom at Marshfield, right over the cars; that since he had been on the Bay, the pile drivers used at the booms were those of the Smith-Powers Logging Company who furnished all the piling, material and boom sticks; that in speaking of the old piling that he had counted in the booms, he had included only the old piling that was in the present boom and used in connection with the present boom, that was strong enough to be of any value; that it looked as though there were places at the boom where it was filled up three or four feet, but there is lots of the old piling there that is dry even at extreme high tide; that there were a few old piling at the lower end of the old boom that was now at the upper end of the store boom and in use there, and these were counted among the old piling, where they were sound enough to have any strength in them; that Captain Polhemus was a Government engineer in charge of the Coos Bay district and Colonel Roesler and Major McIndoe were the United States engineers, with offices in Portland, that had full charge of the Government waters of Coos Bay; that in applying for the permits and making the applications, some

(Testimony of A. H. Powers)

of which were originally granted in the name of C. A. Smith, the witness did all of the work himself for the Smith-Powers Logging Company; that the witness had been over and examined all the timber tributary to Coos River and the timber in Coos County, quite thoroughly, no matter to whom it belonged, the whole length of both Coos Rivers, on foot, with a view to determining the logging possibilities and the manner in which the logs could be brought out, and that under the present laws of Oregon it would not be practicable to bring out all the remaining timber in the freshet waters thereof, by means of the river, because it would cost more for damages that the logs would be worth, and the logs would be greatly damaged themselves unless the laws were so changed as to allow extensive improvements on the river, and that under present conditions the only practical way to handle the logs is to put in a railroad and bring them to tide water, in which case the logs would not go through the Coos River boom; that he was familiar with the ownership of the available timber on the river, and under the present laws and conditions, it is not practicable or profitable for independent loggers to send much more timber down the river.

Witness further testified that he had been working on rivers and handling logs on rivers, and rafting, since 1876 and had logged, driven and improved for logging and driving approximately 25 different streams, some of them in practically the same con-

(Testimony of A. H. Powers)

dition as Coos River from tide water up, and others in a more level country; that the problem of driving on fresh water streams in other parts of the country and in Coos River are in general the same, and that witness had handled over three billion feet of logs.

At this point, counsel for plaintiffs admitted that the witness was thoroughly competent and qualified as an expert upon fresh water logging and driving.

Witness then further testified that since coming to Coos Bay, his logs had all been delivered in Salt water and that he was now delivering daily in the waters of Coos Bay, 600,000 feet, and that the average throughout the year would run from 500,000 to 700,000, feet, and did the year round, and there is no difference in logging out of Coos River boom and out of the fresh-water booms in the lakes where he had been before, except that the tide rises and falls.

Upon re-cross examination, witness testified that the principal object of the Smith-Powers Logging Company was to log and furnish the C. A. Smith Lumber Company with timber and logs, and also to sell logs or drive logs or haul logs for any one else that had timber in the locality; that he owned one third of the capital stock of the Smith-Powers Logging Company, and that of the C. A. Smith Lumber & Manufacturing Company, Mr. Smith, the witness's son, Mr. Brown and Charles Trabert own the balance of the stock; that witness understood that C. A. Smith bought the entire Dean Company and succeeded

(Testimony of George Nay)

to their interest in the boom; that in the winter time, at the very head of tide water on Coos river, the current is too strong when the tide is coming out to raft logs or make up logs.

Witness further testified that the C. A. Smith Lumber & Manufacturing Company did not own any timber and that it is practically owned and controlled by C. A. Smith who owns and controls a large majority of the stock in several companies owning timber land in this vicinity.

Whereupon, on December 16, 1912, Mr. George Nay was called as a witness on behalf off the plaintiffs, and testified as follows:

That he was 49 years old, a carpenter, and had lived on Coos Bay since 1870; that for 18 or 20 years he had been driving piles a good deal of the time, although he had had other employments; that he was acquainted with the booms in controversy, had been around most of them and had a certain knowledge of them; that he had seen more of the creamery boom than of the other, but had known them from the time they were first built, as he had hunted ducks there; that he had worked on them just a little, repairing one of the dolphins; that the last time he was there was in the preceding July, when he went with Mr. Bernitt and made an inspection of the booms; that they had then tried to count the old piling; that ordinarily he could tell old and new piling at a glance, and that you could count the old piling

(Testimony of George Nay)

over there, although you could not tell about some of them; that you could possibly tell piling that had been in there four or five years, depending upon what they were; that the original piles there showed the weather; that there were other new ones; that witness had made a memorandum and diagram, which was offered in evidence and received as Plaintiffs' Exhibit No. 30; referring to this diagram, witness then testified that there were 346 old piles in the old creamery boom; that there were 33 old piles in the Cut-off boom, but that he did not know of any dolphins; that they counted the piling in the old lower boom and in the upper dolphin, that there were 19 old piling in use in the upper dolphin; that in the next dolphin were 14 old piling; that he supposed there were three dolphins, but could not say correctly; that taking dolphins and all together, he made 487 old piling in the lower boom; that he had counted them and put the figures down himself the last July; that he guessed there were some old piling on the bank; that he thought there was a strip of old piling with a new boom driven outside of them and he did not think they counted them at all; that the piling he did count were actually in use; that at the northwest end there was a big square boom that had been recently built, and that he thought there were 21 old piling entering into its construction on the east side of that; that the west end was all new, he thought, though he didn't think there was any new piling among the old ones on the east side; that they tried

(Testimony of George Nay)

to distinguish the old boom from the new by measuring it off from the dolphins and piles on the bank, and they estimated from the number of sticks and the piling on the opposite side they estimated that 175 feet of the old work had been taken off the upper end of the creamery boom; that he thought he could tell the number of new piling in the old upper boom, and that it was 29 and the new piling in the old portion of the lower boom was 15; that that didn't include the new piling driven around the dolphins, that the planking on the dolphins was old, and the new piling was outside and not connected up with the old ones; that in testifying to old piling and old planking, witness meant piling and planking that in his judgment had been in there over four or five years; that he walked over the boom sticks in the old booms and the sticks that were mostly old; that he didn't think he saw a full length stick that was new,—that is, 90 feet long; that there were a few short sticks, but there were none new in the old portion of the creamery boom; that there were different sized chains used on the old boom, and there were very few new chains in the original boom; that as a general thing he could distinguish between old and new chains in going over the boom; that the new chains seemed to be smaller, while the old chains there, was heavy, and others were worn out; that some of the old chains was very large and that witness had had some experience in using chains of that kind in the waters of Coos Bay, in connection with his business of driving

(Testimony of George Nay)

piles, and that he thought the old chain would outlast the smaller chain.

Upon cross examination, witness testified in substance that he had never driven any piles in that boom on his own responsibility; that when he was there going over the piles he was with Mr. Bernitt, Mr. Wittick and a man named Anderson; that he went at Mr. Bernitt's request, and supposed that he took about three fourths of a day going over them and counting them; that they went to the upper end of the lower boom in a gasoline boat and walked a good deal of the rest of the way, but had a skiff along with one man in it; that they went in couples; that they all counted the same part of the boom at the same time and compared notes, as they went along; that he walked, but there were some gaps or open spaces that he could not pass; that some were lying on the banks and some were sunk, some with one end on the bank; that he did not walk all on the south side of the boom nor all on the north side of the channel, but walked most on both sides of the creamery boom; that he did not go around the lower boom or the lower end of the lower boom and that he did not count the new piles in any of the new work; that in the old creamery boom he found 143 piles on the east side of the boom that he did not shake the piles to see whether they were solid or not, and could not say whether they were vertical or not and could not say how many of them had new piling driven along side of them; that in the lower end of the boom there

(Testimony of George Nay)

were 16 old piling and that his testimony with regard to whether they were straight or solid or not or whether they were new piles along side of them, would be the same as that just given for the other piling; that there were 130 old piling on the shore side of the creamery boom; that in answer to whether these piles were in line, witness stated they were strung out promiscuously, there was no line, and were supposed to be in line of the boom; that he walked most of this part of the boom and it was less than half tide at the time; that he didn't notice whether there were any logs in the boom, but that the west shore of the boom was aground; that he could not say what the 16 piles that he had marked on the east side of the river opposite the dolphin at the head of the upper boom were, but there was a dolphin standing there originally, or sheer boom, and they were used in connection with it somewhere, but were not in use since they had extended the opening of the boom farther up the stream; that the dolphin had been removed and these piling were about at low water mark, and he had not examined them,—only just glanced at them as he passed in the boat; that in the lower boom the "6" that he had marked at the northwest corner, was a sheer boom, but he could not say whether it was in use, though he supposed it would be; that he did not know of any old dolphin on the bank, and did not know of any new dolphin there could not say whether there was a new dolphin on that side of the river; that the first dolphin at the

(Testimony of George Nay)

head of the lower boom had 19 old piles in it and was planked with old piling; that he didn't notice the spiking, but that there were not any new planks; that there might have been some, but it was mostly old; that the piling in the dolphin was all running westward or down the river and had all been pushed down river by something; that he could not say how many new piling there were in this dolphin; that there was no planking outside the new piles; that there were 15 piling between this dolphin and the next one and the boom between was a stiff boom four sticks wide; that there were 14 old piling in the next dolphin and the planking was old planking, but the dolphin was in better shape than the other that the old piling was all on the inside of the planking and the new piling all on the outside; but he didn't know how many new piles there were there; that there were 68 piling over there down the bank to where it connected with the change, or the new work commenced; that the new change or new work did not go down to the square pocket; that before you reached the lower end it had filled up with snags and witness thought they had abandoned it and built a new boom outside of it nearer the channel; that there were 21 old piles from the new work to the west end of the boom.

Witness then stated that with regard to the diagram, that instead of 21 there were 84 on the South line; that he could not explain; that the number of piles and the position they were in and whether new piles were driven alongside of them his testimony

(Testimony of George Nay)

with regard to the lower boom would be about the same as that with regard to the upper boom; that he saw some old rotten piles and remains of old piles that he did not count; how many he did not know but thought about six or seven; that there are not many old piling on the island side that are outside of the boom, that the boom lay pretty close to them all and where the boom lay close to the pile, that they counted the pile as being in use; that he did not know whether there were any dolphins at the lower end of the lower boom or not; that the 16 piles he had marked on the north side of the channel or lower boom he thought ran parallel with the channel and below it, but could not say whether there were any boom sticks fastened to them or not; that there were some of them tie-up piles, that there was quite a number of piling in there that was not connected with the boom, but were driven for the use of the boom, but were possibly not in use as the boom stands now; that the next number on the north side of the channel, marked on the diagram as "14", ran cross-wise of the channel; witness thought that they were part of the end of the old boom; that the new boom splits the channel right up the middle and is all new; that the number of old piling is 228 or 223 along up the shore on the land side of the channel; that it runs past the upper end of the boom proper, up towards the creamery, and there were boom sticks attached to them and some of them were pretty old; that he didn't know how many piles there were in the new part of the boom

(Testimony of C. H. Worrell)

or in the channel; that the piles on the shore side were not all old, as there had been repairs there some time, but they counted them as old as they were apparently all of them over five years old; that he didn't count the new piling in the cut-off; that the only new piling he counted were the piling on the shore or island side of the upper boom and 23 on the channel side of the upper boom and 15 new piling on the shore or island side of the lower boom, but didn't count the new piling any where else; that he was not related to the plaintiffs but had worked for Mr. Bernitt some.

Upon re-direct examination, witness testified that he could not say that he had noticed any new piling driven alongside of the old piling in the booms for the apparent purpose of taking the place of the old piling; that the apparent condition of some of the old piling was bad; that the tops were pretty bad above high water mark, but mostly in fair shape; that most of them were approximately upright that sometimes piles will be driven on the slant, as it is hard to drive a pile straight.

Thereafter and on the 27th day of February, 1913, Mr. C. H. Worrell was introduced as a witness in behalf of the defendants, and after being duly sworn, testified in substance as follows:

That he was 32 years of age and was bookkeeper for the Simpson Lumber Company, having held that position nearly nine years; that during the years

(Testimony of C. H. Worrell)

1907 and 1908, he had charge of the books of that Company; that he had with him the account of E. W. Bernitt during that time and that the instrument shown him was a correct copy of the original entry; that the item of February 25, 1909, for \$600.00, charged to Bernitt, was for a check given him; that the credit of July 27 of \$600.00, by the Smith-Powers Logging Company was made by reason of Mr. Bernitt's asking for a check on February 25th on account of his rafting, and it was given him and was carried on the books of the company, charged to Bernitt's account; that the charge to the Smith-Powers Logging Company was made to off-set it, upon Mr. Powers' consent to Mr. L. J. Simpson; that it was credited to the cash account; that that statement in question covers the company's whole record as shown by its books of the rafting done by E. W. Bernitt during the years that it covered; and that the credit of \$600.00 to Mr. Bernitt's account and the charge of the same to the Smith-Powers account was made under the instructions of L. J. Simpson, Manager of the Company; that Mr. Powers asked for the pay for the rafting of the logs for 1908-1909, and at that time consented to charging the \$600.00 to Smith-Powers Co.

The instrument in question was then received in evidence and marked Defendants' Exhibit "I"

(Testimony of C. H. Worrell)

DEFENDANTS' EXHIBIT "I."

Monthly Statement

Office of
SIMPSON LUMBER COMPANY
NORTH BEND, OREGON, . . . 190

E. W. BERNITT

Please Examine This Statement

And Report Any Errors At Once

1907		Folio	Debit	1907		Folio	Credit
Dec 16	To Error Pace	348	24 50	Dec 13	By L H Pace	347	49 01
1908				16	" Rafting	348	4 95
Jany 30	" Cash	111	100 00	18	" "	350	85 63
Feby 26	" "	137	200 00	1908			
29	" Error Raft	426	23 75	Jany 2	" "	378	71 85
Mch 6	" Cash J Krick	143	75 00	4	" "	379	69 01
Apr 20	" " "	183	77 00	7	" "	380	74 08
May 13	" "	203	250 00	11	" "	383	57 62
1909				16	" "	386	51 25
Feby 12	" " E Cutlip	71	60 00	27	" "	393	58 52

(Testimony of C. H. Worrell)

DEFENDANTS' EXHIBIT "I."—Continued.

Debit	1909		Folio	Credit
	May 11	By Coos	1153	78
	19	" Coos	708	88 41
	26	" "	710	41 01
	July 27	" Smith Powers Log Co	712	76 99
	1910		735	600 00
	Mch 21	" Rafting Coos	48	297 44
	29	" "	51	115 61
	Apr 21	" "	63	27 72
	22	" "	"	25 42
	25	" "	64	56 96
	1911			
	Jan 3	" "	185	15 90
	11	" "	188	13 60
				<hr/> 2512 84
	1911			
	Jan 11	By Balance		334 20

(Testimony of C. H. Worrell)

E. W. BERNITT

1911		Folio	Debit	1911		Folio	Credit
Apr 28	To Cash	78	35 08	Jan 11	By Balance from	12	334 20
Aug 7	" " Sisco	19	60 00	23	" Rafting	192	4 27
Sept 4	" "	114	267 84	29	" "	230	1 31
Dec 20	" "	141	200 00	Aug 2	" Blake	269	26 78
30	" "	143	263 41	22	" Stora & Selin	274	288 56
"	" Balance		304 70	23	" Hoeck	"	12 50
				Oct 12	" S & S	292	121 37
				Dec 2	" S & S	308	123 91
					" Gould	309	130 64
				15	" Gould	311	87 49
			1131 03				1131 03
				1912			
				Jan 1	By Balance		304 70

(Testimony of C. H. Worrell)

DEFENDANTS' EXHIBIT "I."—Continued.

E. W. BERNITT

1912		Folio	Debit	1912		Folio	Credit
Feby 15	To Cash	154	392 30	Jan'y 1	By Balance	304	70
Mch 21	" "	161	121 25	8	" Stora & Selin	322	134 80
Apr 20	" "	168	200	30	" C. Gould	327	100 06
June 27	" "	186	300	"	" C. Gould	327	108 94
Sept 4	" "	9	175 31	8	" S & S	333	48 50
	" Balance		304 70	22	" C. Gould	337	104 87
				Mch 6	" C. Gould	344	118 80
				"	" C. Gould	"	109 65
				20	" "	348	113 02
				"	" "	"	102 28
				4	" "	353	108 75
				13	" "	355	5 52
				29	" "	370	87 49
				Aug 17	" "	398	46 18
			1493 56				1493 56
				Sept 4	By Balance		304 70

(Testimony of C. H. Worrell)

E. W. BERNITT

1912		Folio	Debit	1912		Folio	Credit
Oct 29	To Cash	41	197 01	Sept 4	By Balance		304 70
Dec 31	" Balance		304 70	14	" S & S	407	91 58
				24	" Labor	410	2
				Oct 11	" S & S	418	103 43
			501 71				501 71
				1913			
				Jany 1	By Balance from	121½	304 70
				Feby 4	" S & S	464	29 43
				25	" Balance		\$334 13

(Testimony of C. H. Worrell)

with the reservation by plaintiffs that they consent only for the purpose of showing the condition of the entries upon the books of the Simpson Lumber Co, but does not admit it is a true account of plaintiff's dealings with Simpson Lumber Co. That during the fall of 1908 there were no logs delivered from the Coos River boom up to January 1, 1909, that witness remembered of, and that on July 27th, when the \$600.00 entry was made, there was a general settlement with the Smith-Powers Company, and the season's rafting from the boom was at that time credited to the account of the Smith-Powers Logging Company; that the account of Mr. Bernitt, introduced in evidence shows all the entries that would refer to the Coos River boom during that period, as to the plaintiffs; that the several small items in the account under dates in May, represent rafting, but witness was not positive whether it was from Coos River boom or not; that the items in 1910 and 1911 were not for rafting from Coos River boom; that subsequent to the credit on July 27, by the Smith-Powers Logging Company, there were no credits to the plaintiffs by reason of rafting from the boom, and that subsequently the Simpson Lumber Company did business with the Smith-Powers Logging Company, as far as the Coos River boom was concerned.

Upon cross examination, the witness further testified that at the time \$600.00 was charged to Mr. Bernitt he had a credit in the neighborhood of \$300.00;

(Testimony of C. H. Worrell)

that after charging him with the \$600.00, there was practically a balance due from him of about \$300.00, and the books show that there is now a balance due him of \$334.13; that at no time since the above entry has the balance appearing to his credit been less than \$300.00, and witness did not know whether Mr. Bernitt had any knowledge of the crediting to him of the \$600.00 which was charged to the Smith-Powers Logging Company; that witness had rendered him a statement of the account but did not remember whether it was the credit of \$600.00; that the items that appeared to his credit prior to February 25, 1909, were for rafting from Coos River boom, or most of them were; that witness knew of one time when he was rafting from other places and could not say what proportion of the credits was for rafting logs from the Coos River boom; that he thought none of the credits appearing after February 25, 1909, were for rafting from the boom; that none of these items included any charges or credits to Mr. Wittick, this account being Mr. Bernitt's individually, and that witness was practically certain that there had been no credits to Mr. Bernitt for rafting from the Coos River boom since February, 1909; that the bookkeeper of the Simpson Lumber Company had kept an account of the logs that came from the Coos River boom at that time, and they were turned in to the expense account until July, 27th., when the settlement was made with Mr. Powers; that there were no logs delivered from the Coos River

(Testimony of C. H. Worrell)

boom for that season, prior to January, 1909; that the usual manner of carrying the logging accounts had been to divide them between Wittick and Bernitt; that the account of the rafting was divided between them and credited to their respective accounts at the time the rafts were delivered, but that L. J. Simpson directed witness at this time to enter them to the suspense account; witness did not remember the date, but presumed it was about the time the logs began to come in.

Witness further testified that he made Exhibit 15 and could tell therefrom that the plaintiffs delivered logs and piling from the Coos River boom to the Simpson Company during the rafting season beginning January 1, 1909; that Mr. Powers did not direct that a credit be given to Mr. Wittick on his account, but such credit was given; that none of the items of credit on Mr. Bernitt's account were for services by Mr. Wittick.

Upon re-direct examination, witness then testified in substance that prior to the season of 1908 and 1909, the accounts of Mr. Bernitt and Mr. Wittick were carried on the Simpson Lumber Company's books, and the rafts they brought in were credited to them, one half to each, regardless of who delivered the raft; that the charge to Smith-Powers of \$600.00 and the credit to Mr. Bernitt on the books, practically results, being a bookkeeping transaction, that the Smith-Powers Company in effect paying Mr. Bernitt \$600.00; that the Smith-Powers people re-

(Testimony of C. H. Worrell)

ceive just \$600.00 less in settlement with the Simpson Company, and Mr. Bernitt received \$600.00 more.

Upon re-cross examination the witness testified that at the time the \$600.00 was placed to his credit, Mr. Bernitt owed the Simpson Lumber Company approximately \$300.00 and that the account has stood ever since with a credit of \$300.00 in his favor, and he had not drawn the same.

Upon re-direct examination witness testified that Mr. Bernitt had drawn checks at various times and still has a credit of \$300.00 there but did not know whether he could draw it or not; that during that time he had received statements from the Simpson Lumber Company which showed how the books stood at that time, but did not know whether they did show this \$600.00 credit; that he had inquired at different times and been informed how much was due him; that he did not remember whether there had been a statement given Mr. Bernitt since the credit of July 27, 1909, or not; that he didn't remember whether witness had asked for a statement or received one.

Upon re-cross examination witness was shown the writing which he identified as a statement of account for rafts delivered and cash advanced to Mr. Bernitt, which was in witness's handwriting, and stated that that was the kind of statement that he had rendered Mr. Bernitt, which statement was then offered in evidence, and over defendants' objection that it was incompetent, immaterial and irrelevant and was marked plaintiffs' Exhibit No. 31.

(Testimony of C. H. Worrell)

PLAINTIFFS' EXHIBIT No. 31.

MONTHLY STATEMENT

Office of
SIMPSON LUMBER COMPANY NORTH BEND, OREGON, . . . 190 .
E. W. BERNITT

Please Examine This Statement
And Report Any Errors At Once

				Credit
				Debit
1910		1910		
Apr 20	To Cash	Mch 21	By 117 Logs 89651 ft	
	Order C B Oil		" 25 Piles 1180 "	297 44
	& Sup Co		Hauled off Banks river	
		29	" 35 Logs 40124 ft	
			5 Piles 222 "	115 61
			Hauled off Coos River Banks	
			This includes 5 logs	
			4920 ft @ 6.00 from Gould	

(Testimony of C. H. Worrell)

Apr	By	Rafting 115 Logs	34	13
	"	85317 ft @ 40c 3-12		
	"	Rafting 25 Piles	5	90
	"	1180 ft @ $\frac{1}{2}$ c 3-12		
	"	Rafting 34 Logs	15	82
	"	39538 ft @ 40c 3-29		
	"	Rafting 5 Piles	1	11
	"	222 ft @ $\frac{1}{2}$ c 3-29		
	21	Rafting 124 Logs	27	72
	"	138578 ft @ 20c		
	22	Rafting 117 Logs	25	42
		127117 ft @ 20c		
			523	15
			25	55
			\$497	60
		Less Oil Bill		
		Balance		

Stamped
North Bend Mills Div
Simpson Lumber Co
PAID
Apr 25 1910
Per

(Testimony of John Hill)

Upon re-direct examination, the witness stated that this statement (Exhibit No. 31) merely purported to be a statement of the current period that it covers and did not purport to show anything in regard to continuing balances.

Whereupon John Hill was produced as a witness on behalf of the plaintiffs and after being duly sworn, testified in substance as follows:

That he was 43 years of age, by occupation a carpenter and that he had also been a raftsman, having worked off and on as a raftsman for the last twenty years; that he had been on Coos Bay since 1890 and had been acquainted with the booms in question ever since he first came to the Bay; that he was familiar with the piling, dolphins and boom sticks, but could not swear to the chains in the boom; that it seemed to be an easy matter to tell the old piling, those that had been put in over the last four or five years; that he was last at the boom in the preceding December and counted the piling and boom sticks in the boom at that time; that the booms are now larger than they were four or five years ago but that he knew the location of the old booms before the extensions; that he counted 346 old piling in the creamery boom and there were six new piling in the channel side of the old creamery boom.

Witness then corrected himself, saying that he meant on the inside of the old creamery boom that there were 23 new piling on the channel side of the

(Testimony of John Hill)

old creamery boom, and six new piles on the inside on the flat; that he did not count the sticks as there was a new row of boom sticks added on the inside of the piling and the old sticks are in use; were in between the piling on the outside; that in the old creamery boom two piling are standing abreast and the stick between those and the one on the outside were old boom sticks; and the row on the inside are new sticks; that there are three rows of sticks, two old and one new; that most of the old sticks have been there since witness came to the Bay and the new sticks had been there about four or five years; that the old sticks were in use but he did not know the proportion of the old or new ones and did not count them; that there was one row of old boom sticks on the shore side; that the lower boom had been changed in the last four or five years; that it used to be all one,—from bank to bank and now there is a middle row of piles; center boom in it and it is longer than it was; that there were 487 old piling in the lower boom but that he did not see any new piling in the old portion of the lower boom except in the center row and did not count them; that the lower sheer boom is partly old and partly new; that he used to see the sheer boom when he worked there and that part of the sheer boom was new and part old, that he could tell because the sticks were full of staples and one had Bernitt's mark on it; that he was not sure of the number of sticks in the sheer-boom and didn't know whether it was four or five; that the

(Testimony of John Hill)

new sticks are on the outside of the sheer-boom and that he could not remember whether there were new sticks on both sides of it or not; that he walked around the boom sticks in the old lower boom and on the shore side there were 16 new sticks from 30 to 50 feet long and all the rest were old; and he recognized some of them as having been there since he first worked there; that the chains and the way they were stapled looked to be the same as they used to be; that on the island side there were four new boom sticks down as far as the old lower boom extended, but the boom now extended further down, but the witness did not count or notice the boom sticks below that; that all the boom sticks witness counted were in use; that there were some on the bank that he did not count; that there were some logs in the creamery boom at that time, but he did not believe there were any in the lower boom; that the last time witness was at the booms before the time in December that he counted the piling, was about two years before when he was rafting for Bernitt from the upper river, and at that time he saw the boom open and logs running in; that the boom sticks on the lower boom were stapled to-gether and that some of them may have been bored and tied; that the new sticks in the upper boom are bored and then stapled through the holes; that there are three old dolphins at the upper end of the lower boom and are used to fasten the sheer boom to; that these dolphins are made of old piling on the inside of the planking, and some new piling at the lower end out-

(Testimony of John Hill)

side of the planks; that in the upper dolphin there are 19 old piling, in the middle one 15 old piling, and in the lower one 14 old piling; that he did not remember the number of new piling but would say there were two or three; that it seemed to him as though one of them had something like four or five, and the lower one had the most new piling.

Upon cross examination, the witness further testified that he did not remember the date he went over the boom but that C. J. Hillstrom and the plaintiffs were with him; that they reached there about ten o'clock and left between three and four, and spent the intervening time looking it over; that they pulled around the booms with the skiff and walked part of the time on the boom sticks; that he had not been paid for the time spent looking it over and that he frequently worked for Mr. Bernitt and first became familiar with the boom when he was working for Emmett Anderson; that he also worked for C. J. Hillstrom and for Mr. Wittick and that he (Hill) was a cousin of Mr. Wittick; that it was easy to tell old piles from new and that the old piles, as far as he could tell, were in the same shape that they were in when he worked on the boom years before, except the tops were cut off of them; and they counted all the old piles that were in the boom at all, but did not test them to see how solid they were and did not count any that were not in use; and did not count any in the upper boom that did not come up to high water mark; that when he was there it was high

(Testimony of John Hill)

tide or something like a six foot tide, and the shortest piles they counted were some three feet above water; and in answer to a question whether the new piles were not driven alongside of most of the short piles, witness answered no; that in a big freshet the water would not rise more than four feet higher than it was at the time witness was counting them; that some of the piles were leaning and the current would wobble lots of the new piles and old ones, too; that he did not examine closely to see what the old piles were, but that they were fir and cedar; that he did not know just how long piles would last, but there were fir piles 20 years old over there that he could call good, servicable piles; that he did not notice what kind of wood the new piles were and that the tendency of the old pile that has not been shedded, especially if it is battered in driving, is to rot from the top and to be rotten down the middle; that they will look bright and hard enough on the outside, but be hollow or punky on the inside for quite a ways down; that he looked into the old piles but did not test them with a rod or anything; that the original piles in the old boom were not shedded, but left as they were driven, and most of them were driven down at the top from driving; and that the new piles are cut off, shedded and painted or tarred at the top, he thought; that he did not count all the piling scattered round on the marsh and did not count anything away from the boom sticks, but did count all, the piling attached to the boom sticks or that

(Testimony of John Hill)

the boom sticks could rest against; that the boom sticks in the upper boom were like all the old sticks, but there were some new sticks specially along the outside, and there was a new row along the inside, but that he took no notice as to whether they were old or new; that they looked to be all bored and toggled; that in a boom like that the inside logs are the ones that had the most work, but that they did not count the new sticks in the creamery boom; that they counted the boom sticks and the piling at different times and went over the lower boom on the island side three times and on the other side, pulled up and down it in the skiff as they walked it, for there were some new sticks that would not hold up a man, and in places it was open; that it was mostly old stuff on that side, that they did not take any pains to count chains, as a chain is a pretty hard thing to swear to; that the witness and Hillstrom were together, Hillstrom counting out loud and the witness keeping tally with him, pointing out each pile; that the planking on the old dolphins in the lower boom is old, except that there are a few new planks in the upper dolphin; that it was just as easy to tell the difference between old and new planks as between old and new piles, for they rust around the nails and moss grows on them, which would not grow in five years; that the piling in the upper dolphin slants down stream as it was tilted that way in the big freashet of 1890; that he did not count the old and new pieces in the sheer boom, but that there were a lot of new chains and

(Testimony of John Hill)

cross chains in the sheer boom that had at least two full rows added to it; that in the channel side of the old creamery boom there are 143 old piles and 23 new piles; that the piles on the channel side have to stand the most strain and that piles at the lower end take the most strain; that across the lower end of the old creamery boom there were 16 old piling; that the old creamery boom is filling up and had filled up some since witness first went there, and at low tide some of it is bare, maybe half of it,—not all of it; and there are some snags and old water-logged sticks in it; and the tendency of all booms on the Bay is to fill up, as the booms make the current set in such a way as to make the booms fill up; that there is water enough at the present time in the old creamery boom to float any log in a freshet, although it used to be quite a lot deeper 20 years ago; that there are 130 old piling on the shore side of the old creamery boom and six new ones, and that he should judge there were 10 or 15 old piling there that were not in use; that they did not count piling that were in the boom, as they were too short, but he could not tell how many; that in the lower boom on the island side there were 89 old piles and 16 new ones down to the first cross boom; that there were 63 old piles and no new ones for the rest of the distance, and that there are no new ones on the shore side across a space where there is an old abandoned boom; that he did not count the piles in the line that split the channel and did not count any new piles in the lower dolphins; that in

(Testimony of C. J. Hillstrom)

the middle dolphins there are four old piles and on the other side there are 14 old piles; there are 123 good piles in the shore or north side of the old lower boom; that there are no new piles there on that shore, but there are 16 new boomsticks and that he did not count the old boom sticks there; that there were four old boom sticks on the island side of the old boom.

Upon re-direct examination, witness stated that there were 223 piling on the shore side of the lower boom and that if he said 123 piling he wished to correct it; that at high tides on freshets the water would be three or four feet higher than it was on the day he was there, in both of the booms; that some old piles are rather short and he could not swear whether a freshet would go over them or not; that they counted them but did not count the piles that were rotted off below the three feet or above high tide, on the day he was there; that the old piling had been cut off and sloped, and he thought some of them, quite a number of them, would be rather short for the high freshet like the one of 1890; that some of the old piles are cut lower than the new ones but that the old piling that he counted stood at least as high as the new piles.

Whereupon C. J. Hillstrom was recalled as a witness in behalf of the plaintiffs, and testified in substance that he had been over the booms in December, 1912, with John Hill and the plaintiffs; that Mr. Wittick had asked him to go over there and count

(Testimony of C. J. Hillstrom)

the old piling and that from his experience in the line of business, he thought it was quite easy to see the difference between the old piling and the new piling that had been driven in the last four or five years; that he could tell from his examination where the old creamery boom had been and where the extensions were,

Witness then referred to the diagram that he had made at the time, and further testified that there were 8 old piles in the cut-off above the creamery boom, and 33 old piles in the large Cut-off, and on the island side of the creamery boom were 130 old piles; that he noticed six piles that it was hard to distinguish as to whether they were old or new and he called them new; that there were 16 old piles across the lower end of the creamery boom and on the channel side of the creamery boom were 143 old piles, and on the other side of the channel were 16 old piles, and still in use, making a total of 346 old piles in the creamery boom that were in use, not counting some that were broken off or rotted off or twisted out of shape; that in the lower boom, commencing at the first dolphin, there were 19 old piles, in the second dolphin 15 old piles and in the third dolphin 14 old piles, and six old piles between the last dolphin and the cross boom; that there are 68 old piles on the island side and further down on the other part there are 21 old piles; that on the north or land side there are four piles used for holding the swing boom; then three piles used for the same purpose

(Testimony of C. J. Hillstrom)

and 14 piles on the cross boom between the two dolphins; that 16 piles used to hold rafts from swinging on the mud flats below the boom and in all along the land side are 223 piles, making a total of 487 in the lower boom; that all these piles were in use and connected up with boom sticks or holding boom sticks in place; that he also looked at the boom sticks; didn't take much notice of those in the creamery boom but knew there were lots of old ones; that on the land side of the lower boom, there were a few new sticks which were stapled with chains to the old sticks; that he did not count the old sticks on that side; that at the dolphin there was the same old sheer boom that was there when witness was there 15 years before, but there were some new piling and new boom sticks; that in some places the sheer boom is five sticks wide and in some places four sticks wide, while it used to be three sticks at the time witness was in business there; that where it was five sticks wide the ones on each side appeared to be new and that there were some new piling driven below the dolphin; that there were many old planks on the dolphin, but some new ones had been spiked in quite lately, more old ones than new, but that he could not remember about the second or third dolphins, and took no notice of the planking on there; that on the north side of the channel the boom sticks were mostly old; that in one place were 23 new boom sticks, but that was in another place; that along the north side of the channel there is a boom, the

(Testimony of C. J. Hillstrom)

sticks being connected together with chains and in places chained to the piling, and in other places resting between two piling; that at the time he was there witness thought there were some logs way below in the lower boom where they were, and there were logs in the upper boom;

Upon cross examination witness further stated in substance that when witness was there the booms and piling were not in use for catching logs, as they were not catching any at that time; but a person having knowledge of catching logs could tell that the boom sticks had been used for that purpose; and that he was sure that the logs and piling on the north side of the channel in the old lower boom had been used that winter for catching logs; that he did not notice how many places the booms were chained to the piling and did not look at how they were used at the time, because he was doing that work for five years and just one glance over the whole thing would tell him whether the boom was in good shape or not and that he did not take notice of how they were fastened to the piling; that it was fastened about between 25 and 200 places; that he didn't know how far apart the piling were driven on the north side, but would say about twenty feet, and that taking in the sheer booms he thought the old lower boom was three quarters of a mile long; that he could not say whether the sheer boom had new chains or new cross chains, or whether it had more chains on it than when he was there; that this boom is the one that

(Testimony of C. J. Hillstrom)

runs down from the dolphins, and he states there was a new swing boom there, but didn't take notice of it; that he was there to look over old piles and to find every old one there was; that it is pretty hard to tell whether a pile had been in 5 years or six years, and that there are two kinds of piles over there which are easy to tell,—one of them were old piles that he could tell were old and the other were new piles that he could tell were new; that any one that was used to piles could tell; that there were also some old piles that were rotted down that they did not count and there were some new piles that had been driven in lately; that the planking on the dolphins was probably ten years old and a good many of the piles were twenty years old; that some of them were the same piles that were there when he worked there 15 years before; that the piles were mostly yellow fir and from 15 to 25 inches in diameter at the lower line; that the old piles had been cut off and sloped and treated at the tops since he was there; that he did not count the new piles in the new parts of the boom or in the new dolphin; and that he was in no ways related to the plaintiffs.

Upon re-direct examination witness further testified in substance that before the old and new piles were cut off and sloped and painted at the tops; that he was acquainted in a general way with the rise and fall of the water in that locality, and that in the lower boom the freshets would not raise the water to amount to anything,—probably about a

(Testimony of E. Coffin and W. J. Ingram)

foot, and in the creamery boom he would say a couple of feet, probably more, if it was a very big freshet.

Thereupon and on April 11, 1913, Henry E. Coffin was called as a witness on behalf of the defendants, and after being duly sworn testified in substance;

That he was bookkeeper for the Smith-Powers Logging Company, and as such had had charge of their books, records and files since February 26, 1912; that he had made a search for a time book showing the time of work on Coos River booms here in question, during the years 1908 and 1909, being original records of the rafting work and boom work during that period at the Coos River boom and had been unable to find the same; that he had made a careful search and was confident that they were not there.

Whereupon W. J. Ingram was recalled as a witness on behalf of the defendants, and further testified as follows:

That he kept the books on the boom and the work around the boom during the years 1908 and 1909 and put them in the office for Mr. Powers; that he did not see any copy of record made of them and that Mr. Brown had them the last he knew; that he discussed the books and went over them with Mr. Powers when he was there on the boom and Mr. Powers at that time took a copy of the record; that they made a copy of them in the

(Testimony of W. J. Ingram)

office and the witness signed his name to it; that he was in charge of the boom for two and one half years, and during that time they strengthened up the dolphins and drove new piling in them and planked them over; that they put new planking on the dolphins and the planking that is on the dolphins at the upper end of the boom is all new planking excepting the dolphin over next the shore, upon which there is little strain; that they planked the dolphins two or three times, and there is at present none of the old planking on the dolphins in the river; that he remembered distinctly of their planking them all over new and that they drove new piling in the inside of the planking among the old piling; that it was necessary so to do in order to strengthen them up and to have them to spike the planking to, as the old piling were too rotten at the tops to hold the nails and they had to put in new piling to drive the planks to.

Upon cross examination, the witness further testified that he made copies of the time book when he was through with the work in the latter part of February, 1909, he thought; that the time book covers the different rafts that went away from the boom, the time they worked on the boom and any towing that was done; that he kept the book and no one else assisted him; that he did not have the book but left it at the office and had not seen it since; that he did not always keep copies of the time books but that he kept other time books for the company, dif-

(Testimony of A. H. Powers)

ferent ones, which of course were turned in every month; that this in the only one he made a copy of and he made this copy because Mr. Powers asked him to; that the original was left in the office with Gus Brown.

A. H. Powers was then recalled as a witness on behalf of the defendants, and over the plaintiffs' objection that it was incompetent, irrelevant and immaterial, testified that he had made a search for the original time books and copy and the record in the case, and had the bookkeeper go over everything to see if he could find them; that the last time he had seen one of them was in Mr. Douglas' office, where the testimony was being taken, and that the other could not be found at that time; that Mr. Brown, the bookkeeper, could not find it, and that Mr. Brown was now in Monrovia, California, and that the copies that had been put in as evidence were compared by him with the original at the time they were made, and that the copies were correct.

Witness was then shown Exhibit "H" which he testified was in his handwriting and had been made by him at the time they got through rafting, when Mr. Ingram made the copy in the back of the time book of the amount of work that the plaintiffs had done on the boom and the amount of rafts they had handled, and that this exhibit was an exact copy of same, as Mr. Ingram had marked it in his time book, picking out the different dates that were marked on the monthly time book and put those in the back

(Testimony of A. H. Powers)

pages of the time book and signed it; that he went over the time book itself carefully with Mr. Ingram, to see that those included all the entries in regard to work of Mr. Wittick and Mr. Bernitt; that there had never been a settlement with the plaintiffs, but that Mr. Brown had asked them to come and settle up;

Upon cross examination, witness testified that Exhibit "H" was in his own handwriting and that it was a copy of the original entries in the time book; that it was a copy made from the original entries from the copy that was made on the back of the time book, afterwards; that he copied out of the book all work that Mr. Bernitt and Mr. Witrick had done on the boom that season; that the copy was made some time in February, 1909 at the finish of the rafting season; that witness wanted to go over the books himself as well as for to have Mr. Ingram and the bookkeeper go over it, and that he kept a copy in his own private desk there at the office; that he did not think the credit had ever been placed on the books, as they had never had a settlement with Mr. Bernitt; that he thought he had seen the original letter sent by Mr. Brown to Mr. Bernitt asking him to come over, but did not know whether company kept a copy of it or not; that the last time he had seen the book containing the original entries, of which Exhibit "H" was a copy, was in this office, (the office of Douglas, where the testimony was being taken) about a year previous; that he thought it was then

(Testimony of A. H. Powers)

in the possession of the Court, could not say whether it was then introduced in evidence or not; that there were two books, one that finished the year 1908 and the other that started January 1, 1909, both of them being books of original entry, but that witness thought that they only had one of them there; that they had one book and that Exhibit "H" was a copy of two books.

Upon re-direct examination, witness was then shown a letter which he identified as having been received by him about the time it bore date, in the regular course of the mails, which was received in evidence over plaintiffs' objection that it was incompetent, irrelevant and immaterial, and not properly identified, and was marked Defendants' Exhibit "I-I".

DEFENDANTS' EXHIBIT "I" "I."

UNITED STATES ENGINEER OFFICE
321 Custom House

P. O. DRAWER 762 PORTLAND, OREGON

Sept. 5, 1907.

Mr. Chas. A. Smith,

Mr. A. H. Powers, Agent,

Marshfield, Oregon.

Sir:

Referring to your application dated August 17 1907, requesting permission to construct and maintain a log boom in the north mouth of Coos River, Oregon, there is transmitted herewith permit from

(Testimony of A. H. Powers)

the Secretary of War granting you the permission requested.

Your attention is invited to the conditions under which the log boom is to be constructed. These conditions must be faithfully complied with, and in case of transfer to another person the permit should be returned to this office in order that the name of the new owner may be indorsed thereon.

Very respectfully,

S. W. ROESSLER

Lieut. Col., Corps of Engineers, U. S. A.

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Inclo. 8 accompg.

Witness then similarly identified another letter, which, subject to the same objection, was received in evidence and marked Exhibit "J."

DEFENDANTS' EXHIBIT "J."

UNITED STATES ENGINEER OFFICE

321 Custom House

P. O. Drawer 762 PORTLAND, OREGON.

January 4, 1908.

Mr. A. H. Powers,

Vice Prest. Smith-Powers Logging Co.,

Marshfield, Oregon.

Sir:

I have yours of December 30, 1907, and in reply would say that to avoid any claim that the rights of navigation are not fairly protected, I hope that you will take advantage of your permit and built

(Testimony of A. H. Powers)

your authorized boom in the north mouth of Coos River as soon as practicable, and at the same time remove any obstructing dolphins or piles from the north side of the channel, so that navigation may not be unduly interfered with and neighboring riparian owners have no further cause for complaint.

Let me hear from you when this will be done.

Very respectfully,

S. W. ROESSLER

Lieut. Col., Corps of Engineers, U. S. A.

Whereupon a paper purporting to be certificate from the Secretary of State as to the incorporation and corporate capacity of the Smith-Powers Logging Company was introduced, and over objection of plaintiffs that it was incompetent, irrelevant and immaterial, was received in evidence and marked Defendants' Exhibit "K."

DEFENDANTS' EXHIBIT "K."

UNITED STATES OF AMERICA

STATE OF OREGON

Office of the Secretary of State

I, BEN W. OLCOTT, Secretary of State of the State of Oregon, and Custodian of the Seal of said State, do hereby certify:

That on the 16th day of August, 1907, the SMITH-POWERS LOGGING COMPANY, a Minnesota corporation, filed in this office a certified copy of its articles of incorporation, together with a written

(Testimony of A. J. Sherwood)

declaration of its desire and purpose to engage in business within the State of Oregon, and a power of attorney, appointing Albert H. Powers, of Marshfield, Oregon, as attorney in fact for such corporation for the State of Oregon.

I FURTHER CERTIFY that said SMITH-POWERS LOGGING COMPANY has paid a declaration fee and all of the annual license fees due the State of Oregon to June 30, 1913, and has otherwise complied with all of the laws of this State, governing foreign corporations, to the extent required to entitle it to transact business herein from and after the 16th day of August, 1907.

In Testimony Whereof, I have
hereunto set my hand and affixed
hereto the Seal of the State
of Oregon.

[SEAL]

[STATE OF OREGON] Done at the Capitol at
[1859] Salem, Oregon, this 3rd day
of March, A. D. 1913.

BEN W. OLCOTT,
Secretary of State.

By S. H. Kozer,
Deputy.

counsel for plaintiffs stating that they had no objection to the certificate on account of the form thereof.

It was thereupon stipulated by and between the parties hereto, that A. J. Sherwood of Coquille City,

(Testimony of L. J. Simpson)

Oregon, if present, would testify that prior to or about the time of the purchase of the properties of the Dean Lumber Company by C. A. Smith, he, acting as attorney for Mr. Smith, examined the titles of the Dean Company to its various properties, and found nothing of record as against the boom porperties here in question, or the lands adjacent thereto then owned and standing in the name of the Dean Company, and he so reported to Mr. Smith, and for the purpose of this record it may be taken that he was present and so testified, subject, however, to the objection that such testimony and each portion thereof is incompetent, irrelevant and immaterial.

Thereupon L. J. Simpson was on the part of the defendants recalled as a witness, and testified in substance as follows:

That during the year 1908 and the early part of 1909, he was Manager of the Simpson Lumber Company, and that during the summer of 1908, that during that time he had a number of conferences with Mr. Powers about the boom question; that the logs came down about January 1st, and that as he remembered it he had received notice before that time from the Smith-Powers Logging Company that they were going to do the rafting from the boom and that the plaintiffs were not going to do any more rafting; that Mr. Powers came to the office personally and notified the witness that he would see to the

(Testimony of L. J. Simpson)

delivering from the boom and that the Simpson Lumber Company were to pay the money for the rafting to the Smith-Powers Logging Company and not to the plaintiffs; that thereafter and on February 25, the Smith-Powers Logging Company paid Mr. Bernitt \$600.00 and charged it to his account, and on July 27, Mr. Bernitt was given credit for \$600.00 and the same amount charged to the Smith-Powers Logging Company, Mr. Powers having said that he would assume that amount; and this amount was subsequently paid by the Smith-Powers Logging Company in services or otherwise, in the subsequent settlement.

Upon cross examination, witness testified that as he understood it, this was an advance to Mr. Bernitt personally; that after this advance Mr. Bernitt owed the company \$300.00 over and above his account, and that Mr. Bernitt never spoke to the witness at all about authorizing or accepting the payment of that amount from the Smith-Powers Logging Company; that he did not think Mr. Bernitt had ever drawn or accepted the \$300.00 but that the credit still stood on the books; that Mr. Powers and the witness had talked over the matter of the Coos River boom and the ownership of it a number of different times, and at one time discussed with him the question of going into joint ownership of the boom with the Smith-Powers Logging Company, but that was after Mr. Powers had notified him that he was the sole owner of the boom; that witness did not

(Testimony of L. J. Simpson)

know whether prior to the time Powers notified him of his sole ownership Mr. Powers had discussed with him the claim of ownership of the plaintiffs, but would not be surprised if he had, though he could not say positively and had no idea when these conversations could have taken place; that he did not mean to contradict any testimony that he had previously given, but that he had so many different conversations and it was so long ago, that he could not tell exactly; that he remembered talking with the plaintiffs in regard to the boom and the claim that Mr. Powers had made to them; these conversations must have been subsequent to the notice received from Mr. Powers; that it seemed to the witness that the plaintiffs had talked to the witness about going in on the boom with them, but that he could not tell whether it was before or after Mr. Powers claimed the whole ownership; that he had always supposed the plaintiffs had some interest in the boom; that Mr. Powers had demanded payment and settlement several different times and that prior to the time he made the payment he had received a written notice from Mr. Bernitt and Mr. Wittick not to pay any money to the Smith-Powers Logging Company or not to pay their share of it; that he had a number of conversations with Mr. Powers in the Fall of 1908 or the early part of 1909 and probably the question of the boom was mentioned although he could not state positively; that he thought he could fix the time of these negotia-

(Testimony of Victor Wittick)

tions from the records in the company's office, and would do so.

Thereupon the defendants announced that their case was closed, reserving the right to introduce documentary evidence at the trial, and to then call the Government engineers as witnesses.

Whereupon Mr. Wittick was recalled on behalf of the plaintiffs and testified that he was familiar with the condition of the booms, piling and boom sticks, etc., in 1908, and had kept himself informed of the changes made since that date; that he could tell piling that had been put in since that date from piling that was in there before and had counted the old and new piling and could tell the number of boom sticks, the number of chains and the number of piling, etc., and that he could tell old chains from new chains and could tell what had been added there during the last five years; that in July, 1912, he last counted the piles and found 143 old piling on one side and 130 on the other on the old creamery boom; that there are 8 old piling in the upper Cut-off and 33 in the lower Cut-off at the creamery boom; that there were 16 old piling on the creamery side of the river and 16 old piling at the lower end of the old creamery boom; and that he did not count the old and new boom sticks and that it would be pretty hard to tell how many old sticks there were in the boom; that there are three in a row at the upper end on the channel side and two in a row in the middle, and three in a

(Testimony of Victor Wittick)

row at the lower end; that the boom sticks were 70 to 90 feet long and that he did not count them; that the boom was 150 to 200 feet wide at the lower end and about 120 or 130 feet wide at the upper end and about 500 or 600 feet long and that it was more than 800 feet long—close upon 1500 or 2000 feet anyway; that the sticks were all there when the Smith-Powers Logging Company took possession of the property and the plaintiffs had never taken any away; that he counted the sticks in the upper boom and that there were some new, but forgot how many; forgot if it was about 12 or 13; that he did not count the old chains, he only counted the new chains and that there were 30 new chains in the whole upper boom, not including the new portion of them; that he counted all the old piling and new, and that in the lower boom they counted 487 old piles in use that were there prior to the time the Smith-Powers Logging Company took possession of it; that he counted the number of new chains in use in that boom but did not put it down and could not remember them; that he could not tell how many new chains or how many new sticks he did count; that he remembered the logging season of 1908 and 1909 and that it was on the 3rd of January that the boom was opened.

Upon cross examination, the witness testified that the old upper boom was between 1500 and 2000 feet long, but that now it had been extended so that he could not say the length of it; that when he was counting the piling he did not row the boat but walked

(Testimony of Victor Wittick)

along the boom sticks; that Mr. Bernitt, George Nay and John Anderson were a long, John Anderson rowing the boat; that he did not remember whether the plaintiffs had put in any new piling in the boom in 1906 or not; that he thought they put a few in in 1905; that one year they put in a new dolphin and on an average they put in around 30 or 40 new piles each year;

Upon re-direct examination, witness testified that in making the examination in July, 1912, he took particular notice of the dolphins at the upper end of the lower boom; that on the middle dolphin it was put on new and on one corner they put on four or five planks, but all the rest of it was there in 1907-1908; that he saw no new piling in the dolphin, but there was some new piling behind it; that the second dolphin was just as they had used it before, except for five new piling driven below it and that the third dolphin had the old planking on it the same as it used to be, and was pretty sure there was no new planking on it; that the same sheer boom was in use that was there in 1907, except that they had attached more sticks to it, some of them old and some of them new; that on one of the sticks he saw Bernitt's brand.

Upon re-cross examination witness testified that he recognized the planking upon the dolphins and a number of boards, and was sure they were the same old planks, excepting that they put some new ones on one of the dolphins, and that there were no new piles

(Testimony of E. W. Bernitt)

inside the dolphins; that he remembered the piles in the dolphins and they were the same ones; that there was the same number now that there used to be when he used to work there; that there were 15 piles in the upper dolphin and 14, he thought, in the second one; that he thought there were 19 in the first one and 15 in the second one and that the next one had 14; that the 14 piles in the lower dolphin were put in before he came there, somewhere around about 1900, and the 15 in the next one were put in some time in 1902-1903; that he did not remember how many piles there were in the old shore dolphin, but that they put in five, that at the lower end of the boom there were 16 piles in the old dolphin that was blown out, but he did not remember how many there was in the last one; that he thought there was about 30 in the two dolphins at the upper end of the creamery boom that was blown out; that there were eight 12-inch planks on the south side of the dolphin at the head of the lower boom; that the plants were 3 inches thick and were put on in about 1905;

E. W. Bernitt was then recalled as a witness on behalf of the plaintiffs, and being shown the defendants' Exhibit "H", and asked concerning it, testified as follows:

That he had his word down in a memorandum; that Exhibit "H" shows that Bernitt and one man started to work at the boom on December 29th, and witness stated that he did not have a man working

(Testimony of E. W. Bernitt)

for him until January 2nd, when he went up Coos River for Gould; that witness came to the boom on the 5th of January, 1909; that Mr. Wittick's men turned his logs loose on the 3rd of January, and witness then testified as follows:

“When I came there on the 5th, I found the upper boom opened with Mr. Wittick's men laying there catching Mr. Colver's logs from the South Fork. I told them then to shut that boom up because we had to open the lower boom and catch the North Fork logs, that they were going to come down that day. During that day and the next day they came, and I lay there; then the river started to rise—started to rain heavy, and the next day after the West Fork logs were in, then the South Fork logs came, Mr. Hoeck's, and they filled the boom full, and during the night we had to let the sheers go into the North Channel and catch about half a million feet in the North Channel. I laid at the booms until the 10th, before the rear was all in so that I could shut up the booms, and on the 11th I went down below with my scow and started to tow the first raft.

Q. Continue to refer to the statement in regard to the different items there and state whether they are correct or incorrect.

A. Well, I don't see any of them correct,—of course here it says Bernitt hauled one raft to Simpson, \$15.00. Well, I did tow that raft on that date, but I don't know whether it was to Smith's Mill

(Testimony of C. A. Johnson)

or to Simpson's, unless I refer to my book. Just say here on the 11th, towing rafts—don't say where to. On the 12th, it says towing rafts, and here on the 14th, it says here, Bernitt and one man watched boom. From the 14th to the 18th, we had a freshet again—we got more logs out and I attended to the booms again. Here it says from the 14th to the 16th but wherever it says that I had one man it can't be correct, because I never had less than two men from the 2nd day of January until I quit work. Them men never worked by the hour because they were getting full time."

Witness further testified in substance that Mr. Wittick had three or four sets of sticks and his boats and his gear and that witness had his gear, consisting of scows, boats, anchor, sticks, chains and all the ropes that belong to it; that the scow alone cost witness \$3000.00, having two engines in it; that it took a little more than four coils of rope to make three or four rafts and handle them, and it took about four coils of rope for cross lines and kedge lines; that this rope cost on an average 10 or 20 cents per pound.

Upon stipulation of the parties, Mr. C. A. Johnson was thereupon called as a witness for the plaintiffs, and testified in substance as follows:

He was 63 years of age and was experienced in driving piles; had been on Coos Bay for 40 years; that there is lots of piling here that was here when he came; that the life of the pile depended upon the kind

(Testimony of C. A. Johnson)

of a pile it was in the first place; that dry cedar piling is the best, but fir does just as well below high water mark; that he drove piling in what is known as the Coos River boom, and has known the booms ever since they were there; that it is hard to say how long a fir pile will last in that part of the Bay; that he thought some of them were good for more than twenty years; that there is some piling here that was here before the witness came here; that piling lasts longest in salt water, providing they are away from the toredo, and that are none at the location of these booms.

Witness further testified that although he drove piles before on Coos Bay he had been in the pile driving business on Coos Bay from 1890 to 1902 and that the price is according to how they are driven and how long the piles are; that he had driven a great many piles for \$1.00 apiece and when they come farther apart the price is higher, and that a good average price for driving piles is about \$2.00 a pile on the mud flats throughout the Coos River booms, not including the piles, just the labor; that he was familiar with the dolphins and the Cut-off at the boom and that he drove piling in the dolphins and the Cut-off, both of them, and that it was hard driving, and he drove as long as three hours on a single pile.

Upon cross examination, witness testified that he built the Glasgow wharf on Coos Bay in 1890, and that it is all gone, eaten out by toredoes; that he

(Testimony of E. W. Bernitt)

thought the piling in the Fourth Street bridge was dry white cedar and was put in in 1890 and that in re-building the same they had used the same old piling and that he did not know that piling that went in booms or had a strain on it did not last as long as piling that merely bore a dead weight.

Upon re-direct examination witness further stated that he drove the piling for the East Marshfield wharf in 1891; that it was all cedar and was still in use, and that this wharf is situated, with reference to salt water, about the same as the Coos River boom, tho' it might be a little fresher on Coos River.

Whereupon Mr. E. W. Bernitt was recalled on behalf of the plaintiffs and testified in substance that during each season they would probably use three or four coils of rope in rafting; that it was necessary to employ two men to operate his rafting scow, and that in towing a scow it took from four or five dollars' worth of oil a day; that the men he employed at that time were both of age,—his own son being 22 years old and the other man had a government pilot's license; that during the time he was doing this rafting he used the men, boats, boom-sticks and lines; that he had seven sets of boom sticks at that time, but did not use them all over there; that he probably furnished three or four and Mr. Wittick furnished the same amount; that he did not know the value of the boom sticks but that he sold some old sets that he did not consider were any good for \$110.00 a set and had paid as high as \$5.00 apiece for boom chains;

(Testimony of E. W. Bernitt)

that in addition to his power boat he had two boats for running out anchors and lines, and the approximate value of this rafting property that he used in rafting these logs was \$4000.00; that Mr. Wittick's paraphernalia was about the same except that his scow was not as good, and he had a launch in addition but it was not there all the time; that he would call the value of Mr. Wittick's paraphernalia \$2500.00; that Mr. Wittick had four men besides himself at first; afterwards he kept two men there at the boom all the time with the exception of four or five days, when they were all away; that they did not keep the boats there at the boom all night except when they wanted them early in the morning or late at night, and that Mr. Wittick had one scow that he kept over there for the men to live in; that before they put power into the boats it was customary for the men to stay at the boom every night; that when witness came to the boom on January 5th, Mr. Wittick's men were laying at the upper boom; that Mr. Powers came over there that day and asked witness if he could not bring two rafts of Gould's logs out the next day; that the next morning witness looked down and saw two men and the "Mayflower" and "Teddybear" (two gasoline boats) trying to get logs out of the boom; that he didn't see Mr. Ingram for a whole week or two after that and that Mr. Varney seemed to have charge of the crew, that on the 10th witness walked down below on the logs, and made up nearly two rafts that night; that the channel was

(Testimony of E. W. Bernitt)

just about empty the morning Mr. Varney came over with his crew; of course they went to town every night and came back in the morning; that it was a week or more, about after the 10th, that witness first saw Mr. Ingram there; that Ingram was not living there, but that Mr. Ingram and another man moved into Mr. Wittick's scow on or about the 17th, or 18th of January; that from the 5th to the 10th of January witness was using the sheer boom there and letting boats go by and catching logs, and on the 11th he went down with a scow and started to tow, altho' on the 10th I walked on the logs and helped Mr. Wittick and his men get the logs out of the channel and get the channel opened up again; that it was in 1907 he first met Mr. Mereen on the 20th of February, at about three o'clock in the afternoon, and upon being asked how he remenbered this, witness testified as follows:

"Because the mill was broke down and they wanted to have the crank shifted or moved down to North Bend Iron Works, and they didn't know how to get it down and Mr. Squire and I landed from the Coos River boom over there at the wharf, and asked me if I could take it down and I asked him what it weighed, and when he told me the weight I told him I could take it down and he said 'Wait a minute, I'll get Mr. Mereen out of the store'; and he came with Mr. Mereen and introduced him to me, and he went over to the mill, and loaded it on and took it to North Bend. They couldn't handle it there and we brought it back again and took it up to the railroad shop".

(Testimony of E. W. Bernitt)

That previous to that witness had been working on the boom and it was full of logs; that there were logs in it from the 15th of December to the 15th of March and he had been catching logs and making up rafts during all that time; at that time he had four men over there and some one was in attendance at the boom night and day (this was in 1907); once in awhile a party would be at North Bend turning in a raft, that they worked at flood tide, and when they could not work at the boom would be at North Bend or Porter, scaling; that the booms were both full in the Spring of 1907 and they had men staying there at night, living there; that in 1907 witness spoke to Mr. Mereen he thought, about the Cut-off, and that Mr. Mereen told him to take a pile driver and go over there and fix it, which he did, towing the pile driver from the mill and back again, this work being charged up to the Coos River boom; that during the month of January, 1908, the 21st, 22nd and 23rd of January, none of Mr. Powers' men were on the boom; that during January, 1909, none of them were there; that they were all up the river driving logs from the East Fork and witness was tending the booms, catching them, and Mr. Wittick was down below making up rafts at the lower boom; that in the season of 1907-1908, witness called Mr. Powers' attention to the weak sheer boom, and Mr. Powers told him he had nothing to do with it,—to see Mr. Mereen; that witness spoke to Mr. Mereen but he refused to furnish 90 foot sticks and offered 40 and 50 foot sticks which witness said could not be used

(Testimony of John Mattson and E. W. Bernitt)

to build a sheer boom; and that season they used the sheer boom by fastening long lines to the weak placed and in 1909 and 1910 when it was used without strengthening it any, it broke, and they are still using part of it as a cross boom for catching logs in the channel wherever it is necessary.

Whereupon John Mattson was recalled as a witness on behalf of the plaintiffs and further testified in substance as follows:

That he and Haglund bought Mr. Wulff's interest in the rafting gear and booms in Coos River and that he subsequently sold out to Mr. Kruger, who paid him \$1450.00 for it; that he sold his half interest in the rafting gear and his one-eighth interest in the booms; that he bought it in 1889 and sold it about one and a half years later; that if Mr. Kruger testified that he paid only \$500.00 he had been mistaken; that about two months ago witness had told him that he had paid \$1450.00 and that Kruger stated that he had forgotten what he paid; that he thought he only paid \$500.00 and witness had told him that he surely knew better than that.

E. W. Bernitt was again recalled as a witness on behalf of the plaintiffs and further testified in substance as follows:

That he never received a written demand from the Smith-Powers Logging Company for a statement of his bill against them,—that Mr. Powers

(Testimony of E. W. Bernitt)

had asked him why he did not bring in his bill and that the next time witness was at the office making a demand for a scale of the logs Mr. Brown asked him why he did not bring in his bill, and witness told him that he had no bill to bring in until he had the scale of the logs; that he had made a count of the piles, boom-sticks, and material in the booms and that all of the old piling that was in the creamery boom in 1907-1908, prior to the time that the Smith-Powers Logging Company took exclusive possession of the property, was still in the boom, excepting that they had pulled out some at the upper end in order to make the extensions and had blown out four piles at the lower end; that they must have taken out about 32 piles at the upper end, as they took them out for about 185 to 200 feet in length in order to widen out the extension; and that on July 22, 1912, when they were there and counted the piles, there still remained 346 old piles in the creamery boom, including the Cut-off and that all these piles were in use; that all the old boom sticks are still in use at the creamery boom; that they put in new sticks at the upper end wherever the piling was taken out and the old sticks were put on the inside, in order, as witness supposed, to keep the logs running down in to the boom better; that he didn't see how it could strengthen it because there were two sticks there already; that this count of 346 includes all the old piling on both sides of the river and in the Cut-offs used in connection with the boom; that they looked over the chains and af-

(Testimony of E. W. Bernitt)

ter that they found they had put on 13 chains on the upper boom, on the creamery boom on the channel side, 13 chains on the inside, not counting three or four little ones; that he would say that the chains they had renewed on those booms would not be more than 15 or 20% of them; that he was still in the business and had more or less opportunity of observing the changes that had been made in the boom since 1908; that in the lower boom there are 487 old piling in use, including the dolphins and the piling on both sides of the channel, and the 16 piles below that were used for towing up rafts; that the boom sticks there were just the same as plaintiffs left them, with the exception that there are three sticks on the west side where the chains were broken; that the chains broke and the sticks swung in to the channel on a big tide drift and they could not get them back, so they drove 15 new piling on the east side of that drift and put three new sticks in there; that there had been a break on the west side of the lower boom, a staple had pulled out and in place of putting it back again they put a small stick in front of the hole and stapled it; that they did the same thing on the east side of the lower boom and near the county landing where they put in eight new sticks and twelve chains; that the reason they needed so many sticks was because the sticks did not average more than 30 to 50 feet in length, where the sticks that had broken loose would probably run from 85 to 90 feet; that these sticks are attached

(Testimony of E. W. Bernitt)

together with chains the same as plaintiffs left them, with the exception of what new chains were put on; that they are fastened with staples and chains, with the exceptions of the section on the west side of the lower boom where the plaintiffs each gave half of the sticks to fill the space, at which place they were already bored, the sticks being bored and the chains being poor and these defendants had renewed with regular boom chains with toggle rings; that in the old portion of the lower boom 10 new chains had been put on on the east side, and since then they had put in a few more sticks up above the county landing, where some of the sticks had gone adrift by not looking after them; that there are ten new chains from the cannery down and about ten chains around the county landing, and four on the west side from the dolphin down to where the new piles are driven; there they found seven new chains and it took 14 chains to renew these in the old rafting sticks; this does not refer to or include the row of piling and sticks up the center of the channel; that Mr. Powers told the witness that the booms could not be operated the way they were any longer, as the channel had to be split and it would make the boom so much smaller; that he tried to buy the mud flats below the boom but they were holding him up on the price and that he did not know what to do at that time; that the witness suggested letting Mr. Simpson handle that part of it and that they would go in together and give Mr. Simpson one third, and he had said "Anyway to get it fixed"; that witness

(Testimony of E. W. Bernitt)

took it for granted that they were going to carry it on just the same as they had with the Dean Company and made no objection to their going ahead and securing the boom rights; that he took it for granted that plaintiffs were to have an interest, because when Dean & Company were interested with them all such outside business was attended to by Mr. Merchant; that outside of the row of piling that had been driven in the middle of the channel of the lower boom there had been an extension on the lower end of the lower boom in the channel, and that the whole part that is on the mud flat witness did not consider as an extension to the boom but only as a storage boom; that the logs come too quick to get them in there fast enough and on ebb tide they could not get them in there at all; that outside of these storage booms on the flat there had been no actual enlargement of the lower boom; as the part of it built on below would hold only about as much as the boom held before, including the channel; that the extension on below was probably 600 feet long from where the rafting pocket starts and about 80 feet wide; this would not amount to more than 1-10 of the size of the old boom; that the channel was split about in the middle and the extension below would hold about 1-5 as much as the boom above before the channel was split; that the extensions on the boom would hold about as much as the old boom held; that it had been increased about 100%; that the defendants had blown out three dolphins at the head

(Testimony of A. H. Powers)

of the boom, but that the extensions could not have been made without doing so and that it a narrow place and the boom takes the biggest part of the river and rafts and boats could not go by, as it is now on the upper end.

Upon cross examination, witness further testified that he could tell the old chains from the new, as Mr. Powers hardly ever used the kind of chain that the plaintiffs had used; that he had watched Mr. Powers put on chains and he could tell every chain; that the chains on the west side of the boom, the lower boom were put in in 1900-1903, and were heavy chains and were most all there; that the small chains like Mr. Powers was using—three quarters and less—would not last over three or four years if in a place where the swells would work them; but inch or inch and an eighth would last for quite a number of years longer; that the chains that had been put on before were usually old anchor chains; not perfectly new;

Whereupon A. H. Powers was recalled as a witness on behalf of the defendants and further testified in substance that he had never asked Mr. Bernitt or Mr. Wittick to furnish any sticks or to use any of their own boom sticks; that he arrived at the rate of payment at which he had credited them, from what he could hire other boats and other men for and what he had hired out his own boats for, to do similar work, allowing an average fair wage for the amount of work they were

(Testimony of A. H. Powers)

doing; that he had at that time and since had occasion to hire and pay for this class of labor and for this character of boat, and that he had credited plaintiffs with the going rate for that class of work; that he arrived at the number of men Mr. Bernitt furnished by the actual number of men he saw working there; that witness was at the booms almost every day during the time rafting was going on; that he was there sometimes for a half an hour in the morning and an hour in the evening, and made it a point to keep in close touch with the work that was going on there; that he had plenty of boom sticks for handling the rafts and used Mr. Bernitt's and Mr. Wit-tick's sticks merely because they would pull them in there with their boats when they came back, and it made no difference to him whose sticks they used; and the plaintiffs pulled rafts both in the defendants sticks and in their own.

Witness's attention was then called to the testimony of plaintiff Berntit, with regard to mentioning that that sheer boom was weak and being referred to Mr. Mereen and asking him for 90-foot sticks, which he could not furnish; in reference to which witness testified that he never had any such conversation in regard to the sheer boom and he was certain he could not have told them to go to Mr. Mereen, for Mr. Mereen had nothing to do with the boom.

Witness then testified as follows:

"I never had any talk with Mr. Bernitt or Mr.

(Testimony of A. H. Powers)

Wittick about them going in with me on the booms. The only talk that I had with them was in regard to them doing the rafting the first year we was here, or the winter of 1907 and the spring of 1908, and that was that they could go on and do the rafting the same as they had done it theretofore for that year; but so far as having any talk with them in regard to them going in with me on the boom, I never had any such conversation. The conversation in regard to anybody going in with us on the boom was all done with L. J. Simpson and Captain A. M. Simpson, and the first that I had heard that Mr. Bernitt or Mr. Wittick claimed any interest in the boom, I heard it from Mr. Varney and our other men that were working on the boom dividing the channel. This was the first intimation that I had ever had that they claimed any interest in the boom."

Witness then testified that he did not remember any conversation with Mr. Bernitt at which the latter had suggested that he go in with Mr. Simpson and procure the tide flats and let Mr. Simpson have a third interest, and that he never acquiesced in any such proposition; that the extension on the tide flat was used every year and that they had run as high as three or four million feet in to that extension; that if they had not had that extra boom there, there would not have been room enough to hold all the logs that had been in the river, one or two seasons; that the extensions on the new boom had increased its capacity by 175 to 200%; that is, the extensions

(Testimony of A. H. Powers)

would hold that much more than the old boom; that the lower boom is more than double; that he knew that the material that had been charged and the list which was furnished in the copy of the account, used in evidence, was all put in to the boom; that they put three new piling on the front of one dolphin and re-planked all the dolphins, and that the plank-ing on some of the dolphins had been replaced three times in the past five years and that he had helped do some of that work himself.

Upon cross examination, witness further testified that he had used two kinds of pile drivers over there, one a regular scow driver and the other an over-hanging pile driver on a scow, that could be put at any height on the scow so that it could be run right off on to the dolphin, if necessary; that they wholly replanked all the dolphins that are in the river; that the upper dolphin in the center that splits the chan-nel had all been replanked the second time; that this dolphin was there at the time he took charge of the property; that seven or eight new planks had been put on this the last year; that he had used the lower storage boom the last year, every year—and that as the logs came in, if the conditions were favor-able, they are run right out in to that boom; that if it is a low tide and a south west wind is blowing this cannot be done, but in two or three hours after the tide is raised we run the logs out on to the flat and settle them all down to make more room for logs in the boom; that he had run two million out there in less than two hours.

(Testimony of A. H. Powers)

Witness was then asked the following question:

“Now, Mr. Powers, since you have been operating this boom without the aid of Mr. Wittick and Mr. Bernitt, since you have driven this row of piling down the center of the North Channel or North Bend channel of Coos River, is it not a fact that most every year in fact every year, you have had that channel blocked, the whole channel blocked?”

To which he answered “no,” and further stated in substance that during the last two years they had not put any logs in the north channel and that before that one year they filled the entire north channel, and another year he should judge that 500,000 went into it, and another year it was filled about two thirds full; that in 1909 it was full; that it was not filled twice, but that a few logs may have gone into it a second time; that when he visited the boom during the rafting season, he went over the sorting works and sometimes walked up over the logs and sometimes came back around with his boat; that the sorting works are just above the sheer boom of the lower boom,—above the upper end of the lower boom; that he always went where the men were working and most of the logs were in the lower boom that year; that he saw Mr. Bernitt up there catching logs at the upper end of the boom; that witness had employed two men and a gasoline boat for \$10.00 a day; that he had employed one or two other boats about the same size, at different times, and had had

(Testimony of A. H. Powers)

a boat and two men for \$8.00 a day; that he had employed the "Dispatch," the "Merremac," the "Coast," the "Fish" and two or three other boats; that he paid for the "Fish" and two men \$10.00 a day, and the men did the same as Mr. Bernitt's man did,—that is, took the logs over to the mill and helped turn them in; that neither Mr. Bernitt nor his men hepled make up the rafts that year; that the rafts were made up for him tho' he had one or two men who worked a few hours.

Witness then testified as follows:

"I am speaking about all the logs we put through the boom that year—after Mr. Bernitt or his men would come over there the rafts was pretty well made up when they got back from towing over, and sometimes they helped stow a little while, for a few minutes, or helped put on crosslines, and different times I have seen Mr. Wittick's men—Mr. Wittick wasn't there—he might have been over there once or twice during the season, but he was away from there all the time, and I didn't know Mr. Wittick by name until the next fall after that. But I have seen Mr. Wittick's men and also Mr. Bernitt's men, laying in their boats hitched on to the rafts before it was made up, waiting until our men would finish the raft so they could pull it out."

Witness then testified in substance that when he employed the "Coast" and other boats, they supplied some rafting boats and anchors, and furnished

(Testimony of A. H. Powers)

towing lines and that witness furnished Mr. Bernitt a good many lines on his sticks, for his lines were getting old and rotten; that the boats hired by the witness were just as good as Mr. Bernitt's,—better than Mr. Wittick's; that Mr. Bernitt's boat is merely a scow with an engine in it and witness would not want that kind of a boat; that the other boats towed the rafts just as quickly as the plaintiffs' boat did; that at the present time the Smith-Powers Logging Company tows 95% of its logs with the steamboat "Powers," but during the past four or five years he had worked his gasoline boats for anybody that wanted them and had never charged a man for the gasoline boat with two men in it to exceed \$10.00 a day, and also furnished rafting gear, lines, oil and every thing; that he never charged more than \$10.00 a day for a boat and two men, no matter what they were doing; that on these boats he paid one man \$2.50 a day and the other man \$75.00 a month, amounting to about \$5.00 a day for help; that the boats he referred to were the "Teddybear," the "Ranger" and the "Mayflower"; that the "Mayflower" had (20) horse power, the "Teddybear" 22, and the "Ranger" 40; that the amount of gasoline consumed depended altogether upon the number of hours run; that some days the boat would not use a dollar's worth, and some days they would use \$3.00 worth; that the "Teddybeor" would use about \$2.50 worth of oil a day.

Upon re-direct examination, witness testified that

(Testimony of J. E. Oren)

the "Powers" had 250 horse power and employed a crew of six men; that the witness owned six gasoline boats, all of which burned distillate and the average cost for gasoline and distillate was \$60.00 per month.

Whereupon the deposition of J. E. Oren heretofore taken upon stipulation of the parties was introduced on behalf of the defendants, which deposition was in substance as follows:

That he was 37 years of age, a resident of Bay Point, California; that he was vice president and manager of the C. A. Smith Lumber & Mfg. Co. from the time the company was organized until about the middle of September, 1909; that as such officer, he examined the booms in question in the month of March, 1907, and saw them frequently during the time he was in Marshfield. That he then took possession of the booms and did not then see either of the plaintiffs in or around the boom, nor any men present upon or in possession of it; that the record title then stood in the C. A. Smith Lumber & Mfg. Co. but the Smith-Powers Logging Co. was the actual owner and had charge of the management and operation of the booms. That witness represented the C. A. Smith Lumber & Mfg. Co. in the sale and transfer of the boom to the Smith-Powers Co; that after considerable time in negotiating and a great deal of objection on the part of Mr. A. H. Powers as to the price, the sale was made for \$2000.00, the price

(Testimony of J. E. Oren)

being set by the witness and Mr. Powers. That witness was a stockholder in the Lumber & Mfg. Co. but not in the Logging Company, and the deal was an out and out business transaction in which he endeavored to get as good a price for the property as though dealing with strangers. That he inspected the booms at the time and inquired as to their probable value from people familiar with such matters, and considered the price very high; That to the best of his recollection in the spring of the year, 1909, a meeting was held in the office of the Smith-Powers Logging Company, at which there were present Mr. Powers, Mr. Bernitt, Judge Goss, and Mr. Wittick, at which time Mr. Bernitt and Mr. Wittick requested to be recognized as part owners of the boom, which request Mr. Powers refused; that he never had any conversations with either of plaintiffs as to any right or pretended right on their part in these booms.

Upon cross examination witness further testified in substance:

That the C. A. Smith Lumber & Mfg. Co. took possession of the boom at the time they organized in June, 1907; that prior to this time the deal was started with the Smith-Powers Logging Company; witness thought Mr. Squires was looking after the booms for the Company; that he did not remember when the transfer was made to the logging company, and witness never had anything to do with the boom after the arrival of Mr. Powers in the Spring of 1907,

(Testimony of C. F. Dillman)

except to act as the agent of the Lumber & Mfg. Co. in transferring it to the Smith-Powers Logging Co.

Whereupon the deposition of C. F. Dillman, heretofore taken upon stipulation of the parties was introduced on behalf of the defendants, which deposition was in substance as follows:

That he resided at Sacramento and was President of the National Bank of D. O. Mills & Co.; that he was a stockholder, director, and later president of the Dean Lumber Co. from 1903 to 1907, and that the booms in question were sold by it to C. A. Smith. That the witness visited the booms with C. H. Merchant, and was introduced to Mr. Bernitt; that he was positive nothing was said at the time to indicate that he was a partner with Mr. Bernitt or anyone else in the boom, or that Bernitt claimed any interest in it; that nothing was said about the ownership of the boom or anything that raised any question in his mind as to the ownership of the boom by the Dean Lumber Company; that Mr. Merchant introduced the witness to Mr. Bernitt, adding "This is the new boss of the Dean Co."; that there was a freshet in the river at the time, and they talked about the high water; that they were together for about ten minutes, but the conversation was merely a casual one, and nothing of any importance was discussed.

That C. H. Merchant had charge of the properties as receiver of E. B. Dean & Co. at the time it was taken over by the Dean Lumber Co.; that he then

(Testimony of C. F. Dillman)

showed the witness over the property he was holding as receiver, including the boom, that he told witness it was a part of the property that had belonged to E. B. Dean & Co. and gave witness to understand that he had title to it as receiver. That to the best of witness' recollection Mr. Merchant told him the property was leased to Bernitt & Wittick for five years; that they were to keep it in repair for a term of five years at their expense, and explained that they were to pay a certain rental according to the amount of logs they sent through, but he had forgotten the rate.

That the first he heard of any claim by plaintiffs was after the property was sold to Mr. Smith; that absolute ownership was claimed by the Dean Lumber Co. and no one else asserted any title to it as far as witness knew.

That all of the books of the Dean Lumber Company and any books of C. H. Merchant, receiver, or of E. B. Dean & Co. that may have come into the possession of the witness or the Dean Lumber Co. were kept in the office of the Dean Lumber Co. in San Francisco, and were destroyed in the fire of 1906; and all the other books were destroyed by the witness when he rebuilt his house about a year previous (1910).

That the books of the Lumber Co. did not show that Bernitt & Wittick had any claim or ownership of the property, and nothing was ever done by the Directors to give them any interest in the boom.

(Testimony of C. F. Dillman)

Nor, to the best of witness' knowledge was any outstanding claim to the boom called to the attention of any officer or discussed by them.

Nothing was of record to show any outstanding claim, and nothing was ever called to witness' attention that caused him for a moment to question the Lumber Co's title.

Upon cross examination witness further testified in substance that he couldn't remember the chain of title but that it was obtained through receiver proceedings about March, 1903.

That he never met Bernitt excepting the few minutes already spoken of. That at the time the Dean Lumber Co. got title to the boom, Mr. Merchant had charge as receiver, and witness was told it was being operated by Mr. Bernitt under a lease and he presume it was operated in the same way as it was after the Lumber Co. took it over, namely, for a rental that varied according to the amount of logs that went through the boom; that Messrs. Bernitt and Wittick were to maintain and repair the boom, and witness did not remember of any charges on the books for repairs of the boom. That Mr. Merchant talked to the witness about the ownership of the boom, both before and after the Dean Lumber Co. acquired title. That witness had been on Coos Bay some fourteen or fifteen times, several times while Mr. Merchant was receiver, and some ten or twelve times since the Lumber Co. took it over. Each time he

(Testimony of C. F. Dillman)

visited the property of the Company, and looked into the company affairs; that he usually stayed about a week, altho he only stayed over night once, and on another occasion, stayed two weeks; that he tried to get up there three or four times a year; that he kept in close touch with the business; that he saw the boom account on the ledger frequently and talked about it and understood it thoroughly as explained by C. H. Merchant and D. S. Moulton.

Record Approved this December 1, 1914.

CHAS. E. WOLVERTON,
Judge.

Filed December 1, 1914.

G. H. MARSH,
Clerk.

PLAINTIFFS' EXHIBIT No. 9.

Report Errors at Once

MONTHLY STATEMENT

Folio

E. W. Burnette

City

In Account With

SMITH-POWERS LOGGING COMPANY

Marshfield Or. Aug. 25 1908

	Dr.	Cr.	Bal.
To balance			
To bill rendered		208.22	
1907-08 Cr on 1,189,830 ft logs @ 17½¢		28.78	
			237.00
Aug 25 Act Damage to Property at Boom	50.00		
			187.00

FILED

Jun 9 1913

A. M. Cannon

Clerk U. S. District Court

PLAINTIFFS' EXHIBIT No. 10.

Marshfield, Or., January 1st, 1888.

Coos River Boom

Manufacturers
of and Dealers in
all kinds
Of Lumber.
Marshfield, Coos
County, Or.
1887

Bought of E. B. DEAN & CO.,
Wholesale and Retail Dealers in
Groceries, Provisions and Dry Goods,
Clothing, Boots and Shoes.
Hardware, Glassware, Crockery, etc.

January	14	To	Str Bertha		\$	2	50
	28	"	Deubner & Co.			2	50
March	29	"	Str Bertha			3	
Octbr	17	"	Boomage 114 Lgs	48,498 ft		12	12
			Rafting	"		16	96
			Keeping	13		1	49
Novbr	12	"	210 # Chain	4,990 ft		8	40
			1 Auger Bit				62
	14	"	16 # Rope			2	40
	16	"	50 # Spike			3	
	30	"	135 S Rope			20	25

PLAINTIFFS' EXHIBIT No. 10.—Continued.

1887

Decbr

6	to 482 S Rope	72 30	
17	" Str Bertha	3	
31	" 1/4 Bal. G Wulff	68 33	
	" 1/4 " W Burnitt	68 34	
	" E B D & Co. 1/2 Bal	136 67	421 88
By Credit Balance carried to next year			100 00
			<hr/>
			\$521 88

Cr

By 114 Logs 48,498 ft	3 1/2	170 23	
Boomage 2092 Logs 1,406,602 ft 25c		351 65	
			<hr/>
			\$521 88

Jany

1	To Deubner & Co	5 53	
	J. W. Rose for 1887	25	
28	" Boom a/c E B Dean & Co 1/2 bal	34 73	
	Geo Wulff 1/4 Bal	17 37	
	Wm Burnett 1/4 "	17 37	
			<hr/>
			\$100 00

1888		Cr			
Jany	1	By	Balance	100 00	
1888					
Jany	31	To	Str Bertha		\$ 6 50
Febry	24	"	Rafting & Boomage on 28 Logs		11 41
April	23	"	1 Auger		1
June	27	"	Str Bertha		5
Sepr	25	"	161 # Spikes		8 05
			520 # Chain	31½	18 20
	26	"	52 # Rope		7 80
	27	"	15 # Rope		2 25
	28	"	2000 ft Planks		20
Octbr	4	"	36 Boomsticks 2575 ft 6c		154 50
			Wm Burnitt Rafting		6 44
			Wulff & Kruger "		6 44
	5	"	1500 ft Planks		12
	10	"	200 # Spikes		10
	12	"	630 # Chain	31½	22 05
	13	"	100 # Spikes		5
	19	"	906 # Chain		72 48
Novbr	6	"	D McIntosh Labor		30
	16	"	Hyde & Neal Piledriving		94
	17	"	50 # Spykes	51½	2 75

PLAINTIFFS' EXHIBIT No. 10.—Continued.

1888	11	to	Cash 29 Piles 1085 ft	5c	54 25
Decbr	15	"	655 # Rope		104 80
			2 hdlc Axes		2 50
	31	"	Deubner & Co Bill Blacksmithing		36 69
			J W Rose Watchman		25
1889	12	"	Chain & Spikes		7 12
Jany			Str Bertha		5
			E B Dean & Co $\frac{1}{2}$ Balance		51 93
			Wm Bernitt $\frac{1}{4}$		25 96
			Haglund & Matson $\frac{1}{4}$		25 97
					\$835 09
Febry	2	By	John Hillstrom	148 L. 76,985 ft. 25c	\$ 19 23
	24	"	Nelson & Petersen	558 " 518,568 "	129 64
			Harquist & Haglund	360 " 328,784 "	82 19
			C G Granholm	172 " 119,799 "	29 94
			John Matson	74 " 39,947 "	9 98
			Coos River Boom	28 " 19,030 "	4 75
			J R Bunch	20 " 13,824 "	3 45
			Wulff & Kruger $\frac{1}{2}$	15 " 14,995 "	1 87
			Wm Burnett	" "	1 87

June	23	"	Stora & Carlson	3	"	1,454	"	36
			Unknown	2	"	2,636	"	65
			Chas Rodin	1	"	426	"	10
			P C Durgin	49	"	43,188	"	10 79
1889			28 Logs no Brand			19,030	31½	66 60
April	9	"	57 " "			32,633	"	114 21
			C Rodin	1129	"	1007,816	" 25c	251 95
			C G Granholm	351	"	226,114	"	56 52
			Cala. Lumber Co	12	"	9,761	"	2 44
			Geo Stemmerman	218	"	151,296	"	37 82
			Nelson & Petersen	3	"	2,786	"	69
			P C Durgin	4	"	3,117	"	77
			P J Petersen	2	"	1,474	"	37
			Carlson & Stora	47	"	20,966	"	5 24
			Honzell & Hillstrom	16	"	8,136	"	2 03
			John Matson	1	"	774	"	19
			J B Bunch	13	"	5,769	"	1 44
								\$835.09

FILED Jun 9 1913 A. M. Cannon, Clerk U. S. District Court.

PLAINTIFFS' EXHIBIT No. 14.

KNOW ALL MEN BY THESE PRESENTS, That in consideration of One Thousand Six Hundred Dollars, the receipt whereof is hereby acknowledged, I do hereby grant, bargain, sell, transfer and deliver unto Alex Tast, his heirs, executors, administrators, and assigns, the following described personal property, to-wit:

One undivided half of two Rafting Scows, Three Boats, one small skiff, six Anchors, Eight set of Boom Sticks and all other tools, ropes, pike poles, and other accoutrements belonging to the rafting gear, heretofore used by Alfred Haglund and C John Hilstrom, in the rafting business on Coos Bay, in Coos County, Oregon, Also all the right title and interest that I have in and to what is known as the Coos River Booms, at or near the mouth of Coos River in Coos County, Oregon.

TO HAVE AND TO HOLD the same unto the said party of the second part, his executors, administrators and assigns forever.

And I, the said Grantor, do hereby covenant and agree to and with the said Grantee that I am the owner of said above described personal property; that the same is free from all encumbrances and that I have a good right to sell the same, and that I, my heirs, executors, administrators and assigns

shall warrant and defend the same against the lawful claims and demands of all persons whomsoever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 27 ' ' day of May, A. D. 1893.
Signed, sealed and delivered in the presence of

T L OWEN

JOHN F HALL

ALFRED HAGLUND [Seal]

Filed Jun 9 1913 A. M. Cannon

Clerk U. S. District Court.

PLAINTIFFS' EXHIBIT No. 29.

UNITED STATES OF AMERICA

STATE OF OREGON

OFFICE OF THE SECRETARY OF STATE

I, BEN W. OLCOTT, Secretary of State of the State of Oregon, and Custodian of the Seal of said State, do hereby certify:

That I have carefully compared the annexed copies of the certified copies of the original and amended articles of incorporation of the SMITH-POWERS LOGGING COMPANY, a Minnesota corporation, with the certified copies of the original and amended articles of incorporation filed in this office on the 13th day of July, 1910, and find the same to be full, true and correct transcripts therefrom and of the

whole thereof, together with all official endorsements thereon; and

I FURTHER CERTIFY that, under the laws of the State of Oregon, I am the legal custodian of the certified copies of the original and supplementary articles of incorporation of foreign corporations transacting business in the State of Oregon.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the State of Oregon.

Done at the Capitol at Salem, Oregon, this 29th day of January, A. D. 1912.

[SEAL]

BEN W. OLCOTT

[STATE OF]

Secretary of State

[OREGON]

By S. H. Kozer

[1859]

Deputy.

CERTIFICATE OF INCORPORATION OF SMITH-POWERS LOGGING COMPANY

The undersigned having associated to form a corporation under the general laws of the State of Minnesota, do hereby certify:

I.

The name of the corporation shall be SMITH-POWERS LOGGING COMPANY

The general nature of its business shall be to carry on logging operations in the United States of America, and to that end to buy hold and sell timber lands and stumpage; to cut, buy and sell logs and timber products; to transport, raft, float and boom the same, and for the latter purpose to improve streams and maintain waterways, construct or acquire, and operate dams, sluices, flumes, chutes, tramways, rail and logging roads, and construct, operate and maintain booms for the collection and sorting of logs and other timber products for itself, and for others with the right to charge and collect reasonable tolls for such services; to construct, own, operate and maintain all manner of instrumentalities for the development and transmission of energy, and all crafts and appliances for carrying on or facilitating said business; to acquire by purchase or by the exercise of the right of eminent domain the lands, tenements, the easements, and franchises necessary or convenient for carrying on the business and exercising the

powers enumerated; too buy and sell supplies in connection with said business, and to do whatever is necessary or convenient for its efficient conduct.

The principal place of transacting the business of the corporation shall be at the City of Minneapolis, in the state of Minnesota, but the corporation may establish an office and conduct business including the holding of directors meetings, in the state of Oregon and also in the state of California.

II.

The period of duration of the corporation shall be thirty (30) years

III.

The names and places of residence of the incorporators are Charles A. Smith, Albert H. Powers and Charles L. Trabert, all residing at Minneapolis, Minnesota.

IV.

The management of the corporation shall be vested in a board of directors consisting of three persons, who shall elect from their number a president and a vice president of the corporation, and they shall also elect a secretary and a treasurer who are not required to be directors or stockholders, and they may elect the same person to hold both of said last named offices.

The date of the annual meeting at which said board shall be elected shall be the second Tuesday in January in each year.

The above named Charles A. Smith, Albert H. Powers and Charles L. Trabert whose addresses are Minneapolis, Minnesota, shall compose the board of directors until the first election of directors in January, 1908.

V.

The amount of capital stock of this corporation is One Hundred and Fifty Thousand Dollars (\$150,000.)

The same shall be paid in as required by the board of directors and shall be divided into fifteen hundred (1500) shares of One Hundred Dollars (\$100) par value each.

VI.

The highest amount of indebtedness or liability to which the corporation shall at any time be subject is One Million Dollars, (\$1,000,000.)

IN WITNESS WHEREOF, we have hereunto subscribed our names this 29th day of June, 1907

CHARLES A. SMITH
ALBERT H. POWERS
CHARLES L. TRABERT

In presence of

A. UELAND
W. M. JEROME

State of Minnesota,
County of Hennepin,—ss.

On this 29th day of June, 1907, before me personally appeared Charles A. Smith, Albert H. Powers and Charles L. Trabert, to me known to be the persons described in and who executed the foregoing certificate of incorporation and acknowledged that they executed the same as their free act and deed.

WILLIAM FURST,

Notary Public, Hennepin County, Minn.

My commision expires July, 19th, 1909.

Filed for record in this office July 10, A. D. 1907,
at 9 o'clock A. M.

JULIUS A. SCHMAHL,

Secretary of State.

Corporate Seal.

0-3-425.

CERTIFICATE OF AMENDMENT OF CERTIFICATE OF INCORPORATION OF SMITH-POWERS LOGGING COMPANY.

We, Charles A. Smith and Charles L. Trabert respectively the President and Secretary of the Smith-Powers Logging Company and respectively the presiding officer and secretary of the special meeting of the stockholders of said company held at its office No. 411 Andrus Building, Minneapolis, Minnesota, on the 16th day of June, 1910, at four o'clock in the afternoon, pursuant to a notice and call of such meeting duly given and made do hereby certify that at said special meeting a resolution was adopted by a majority vote of all the shareholders and shares of said company reading as follows: to-wit,

RESOLVED, that article or subdivision V of the certificate of incorporation of the Smith-Powers Logging Company be and the same is hereby amended to read as follows:

ARTICLE V.

The amount of the capital stock of this corporation is Five Hundred Thousand dollars (\$500,000.) The same shall be paid in as required by the board of Directors and it shall be divided into five thousand (5000) shares of One Hundred Dollars (\$100.) par value each.

We further certify that, by the aforesaid resolution the capital stock of said company was increased

from One Hundred and Fifty Thousand Dollars (\$150,000.) to Five Hundred Thousand Dollars (\$500,000.)

IN WITNESS WHEREOF, we have hereunto subscribed our names and affixed the seal of the said Smith-Powers Logging Company this 16th day of June, 1910

C. A. SMITH President

CHARLES L. TRABERT, Secretary

In presence of

OSCAR W. WEIBEL

BERTHA K. HAMMOND

State of Minnesota,

County of Hennepin,—ss.

On this 16th day of June, 1910, before me personally appeared Charles A. Smith and Charles L. Trabert to me known to be respectively the President and Secretary of the Smith-Powers Logging Company and the persons named in and who executed the foregoing certificate and acknowledged that they executed the same as their free act and deed and as their free act and deed as officers of the said corporation.

LYMAN E. MINAR,

Notary Public, Hennepin County, Minnesota

My commision expires July 8, 1914.

Filed for record in this office on the 29th day of June A. D. 1910, at 3¼ o'clock P. M.

JULIUS A. SCHMAHL,

T-3-116.

Secretary of State.

UNITED STATES OF AMERICA
STATE OF MINNESOTA
DEPARTMENT OF STATE

I, JULIUS A. SCHMAHL, Secretary of State of the State of Minnesota do hereby certify that I have compared the annexed copy with record of the original instruments in my office of Articles of Incorporation of Smith-Powers Logging Company filed July 10th, 1907, and recorded in book 0-3 on page 424 amendment filed June 29th, 1910, and recorded in book T-3 on page 116 and that said copy is a true and correct transcript of said record of said original instruments and of the whole thereof.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol, in Saint Paul, this 8th day of July A. D. nineteen hundred and ten

JULIUS A. SCHMAHL

[STATE SEAL]

Secretary of State.

ENDORSED: F-433

SMITH-POWERS LOGGING COMPANY

Filed in the office of the Secretary of State of the State of Oregon, at eight o'clock A. M., the 13 day of July, 1910

F. W. BENSON,

Secretary of State

FILED Jun 9 1913 A. M. Cannon

Clerk U. S. District Court



DEFENDANTS' EXHIBIT "A."

UNITED STATES ENGINEER OFFICE

First District

802 Couch Building

Portland, Oregon

April 3, 1911.

Smith-Powers Logging Co.,

Marshfield, Oregon.

Gentlemen:

There is returned herewith original permit dated August 30, 1907, in favor of Mr. Charles A. Smith, of Marshfield, Oregon, to construct and maintain a log boom in the north mouth of Coos River, the necessary record of transfer to the Smith-Powers Logging Company having been made in this office.

Very respectfully,

JAY J. MORROW

Major, Corps of Engineers, U. S. A.

Coos R. 127/86

Inclo. 85 & inclo.

129/8 accomp.

127 Coos U. S. Engineer office

85 R Portland, Oregon.

THIS IDENTURE, Made this 23rd day of March, 1911, WITNESSETH:

That for and in consideration of the sum of One Dollar (\$1.00) to him in hand paid, the receipt whereof is hereby acknowledged, Charles A. Smith, of Marshfield, Oregon, has assigned, sold, transferred and set over to the Smith-Powers Logging Company, a corporation, organized under the laws of the state of Minnesota, and duly licensed to transact business in the State of Oregon, that certain log boom situated in the north mouth of Coos River, Oregon, as shown on the attached map and the right and permission to maintain the same, subject to the conditions of maintenance as shown by a certain permit granted by the War Department of the United States on the 30th day of August, 1907, hereto attached, and hereby requests that a permit to maintain the same be granted by said authority to the said Smith-Powers Logging Company.

CHARLES A. SMITH

Inclo 4 attached

129 U. S. Engineer Office
C R Sept. 5, 1907
8 Portland, Oregon.

WAR DEPARTMENT,

Office of the Chief of Engineers,
Washington,

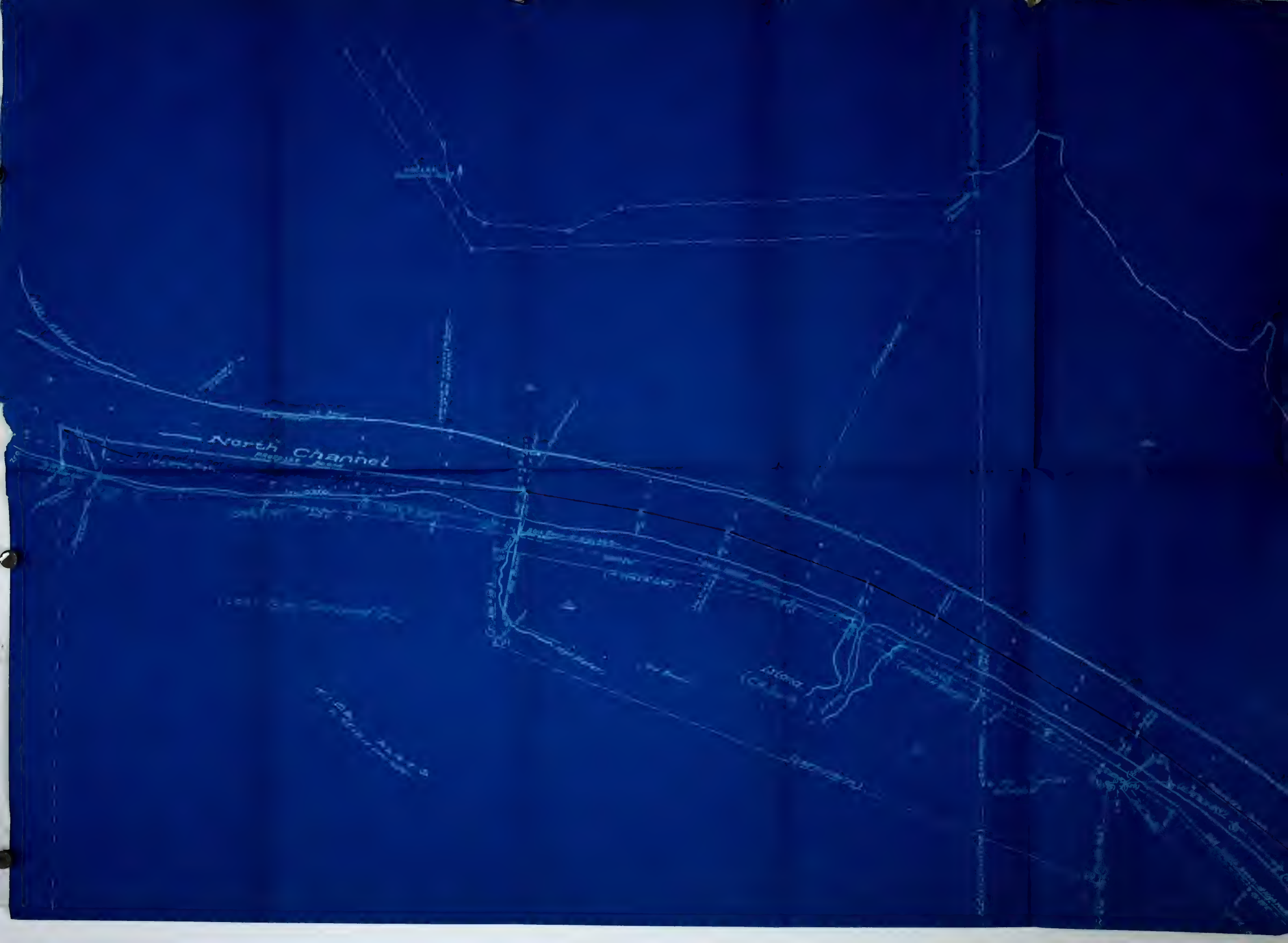
August 30, 1907.

In pursuance of the provisions of section 10 of the river and harbor act of March 3, 1899, the consent of the War Department is hereby given to CHARLES A. SMITH, of Marshfield, Oregon, to construct and maintain a log boom in the north mouth of COOS RIVER, Oregon, at the location shown on the attached map, subject to the following conditions:

1. That the work herein permitted to be done shall be subject to the supervision and approval of the Engineer Officer of the United States Army in charge of the locality.

2. That this permit may be revoked at any time, and the grantee be required to remove the boom without previous notice; and that suitable lights shall be maintained on the said boom, if required for the safety of navigation.

3. That in case of sale or transfer of the boom herein authorized to another party, this permit



Map showing

DROPSIES LOG BOOMS

NORTH CHANNEL COOS RIVER

COOS BAY OREGON

E.A. Smith Lumber & Mfg Co.

Copyright 1914 by E.A. Smith

Scale 200 ft. = 1 inch

Coos Bay Oregon
Coos River
Coos Bay



South Channel

North Channel

River

488

Incl

129

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A.
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m:

shall be returned by the holder thereof to the United States Engineer Officer at Portland, Oregon.

IT IS UNDERSTOOD that this instrument in revocable at will by the Secretary of War; that it simply gives consent under said Act of Congress to the construction and maintenance of the structure by the grantee; that it does not authorize any injury to private property or invasion of private rights, nor any infringement of local and State laws of regulations.

By authority of the Secretary of War:

A. MacKENZIE
Brig. Gen., Chief of Engineers,
U. S. Army.

64797

Inclo. 2 attached.

Mr. CHARLES A. SMITH,

Marshfield, Oregon.

Filed Jun 9 1913 A. M. Cannon, Clerk
U. S. District Court.

DEFENDANTS' EXHIBIT "F."

Inclo 20 attached

129 U. S. Engineer Office

C R

21 Portland, Oregon.

WAR DEPARTMENT

Office of the Chief of Engineers,
Washington.

December 26, 1908.

In pursuance of the provisions of section 10 of the river and harbors Act of March 3, 1899, the consent of the War Department is hereby given to the SMITH-POWERS LOGGING COMPANY, of Marshfield, Oregon, to construct and maintain a log boom in COOS RIVER (North Channel), Oregon, at the location and as shown in red on the attached map, subject to the following conditions:

1. That the work herein permitted to be done shall be subject to the supervision and approval of the Engineer Officer of the United States Army in charge of the locality.

2. That the said boom shall be erected in such a manner as not to interfere with the full access by boats to adjacent shore property which may be owned by other parties, unless authorized by said owners.

IT IS UNDERSTOOD that this instrument is revocable at will by the Secretary of War; that it



simply gives consent under said Act of Congress to the construction and maintainance of the structure by the grantee; that it does not authorize any injury to private property or invasion of private rights, nor any infringement of local and State laws or regulations.

By authority of the Secretary of War.

W. L. MARSHALL

Chief of Engineers, U. S. Army.

Messrs. SMITH-POWERS LOGGING CO.,
Marshfield, Oregon.

Filed Jun 9 1913 A. M. Cannon,
Clerk U. S. District Court.

70062

Inclo. 1 attached.

EXHIBIT "G."

COOS RIVER

S M I T H

F O W E R S

Lot 2 near river

COOS RIVER

Lot 2 - 20.36 acres

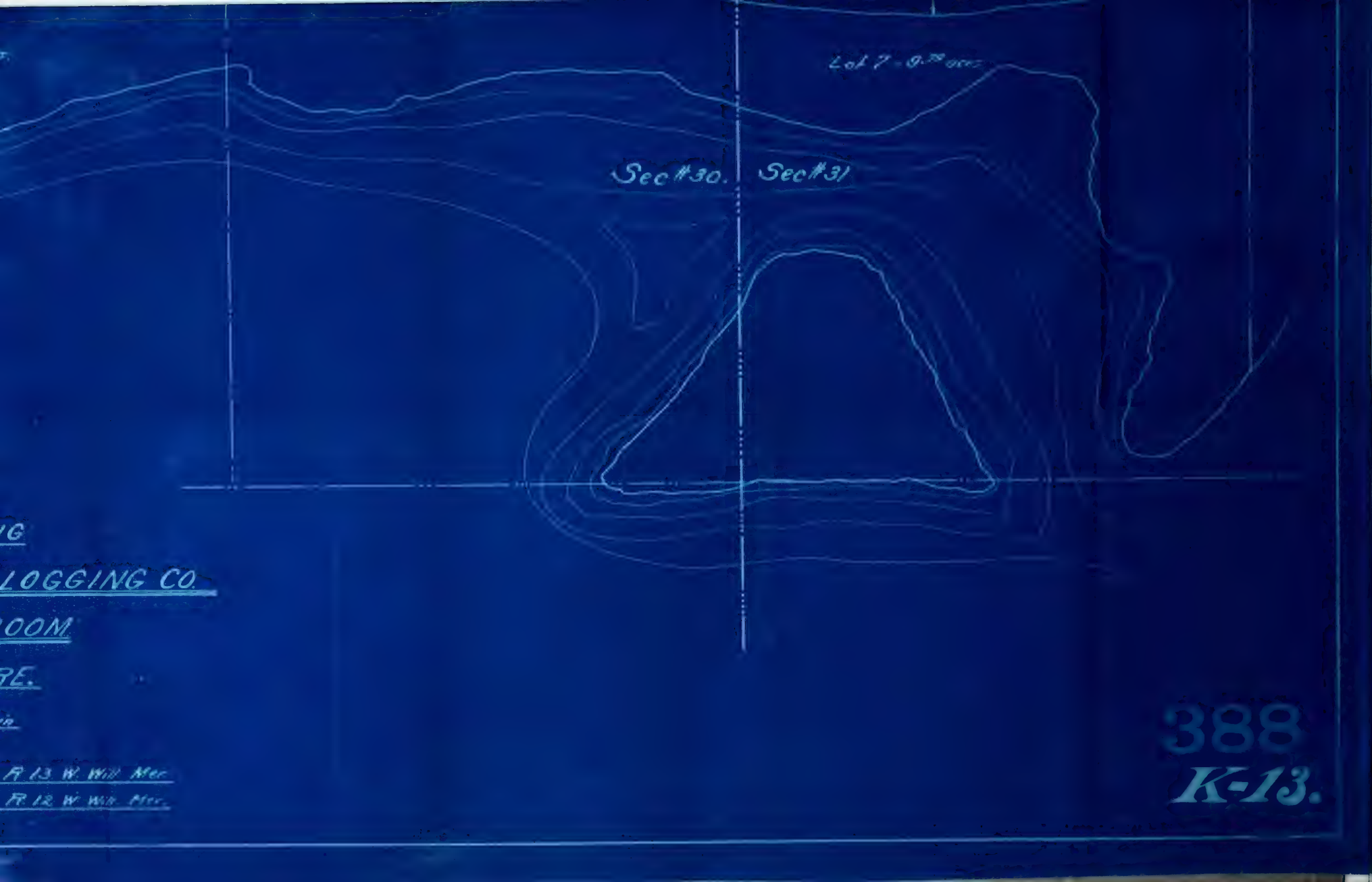
MAP SHOWING
SMITH POWERS LOGGING
PROPOSED BOOM
COOS RIVER, ORE.

Scale 200ft - 1 in.

Situated in

Lot 2, Sec 30, Twp 25 S. R. 13 W. Will. Mer.
and Lot 7, Sec 31, Twp 25 S. R. 12 W. Will. Mer.

Geo. Collins



Lot 7-9 sec

Sec #30.

Sec #31

IG
LOGGING CO.

OOM

RE.

R 13 W. W. Mer.

R 12 W. W. Mer.

388
K-13.

*In the District Court of the United States, for the District
of Oregon.*

E. W. BERNITT and VICTOR WITTICK,
Plaintiffs.

vs.

SMITH-POWERS LOGGING COMPANY,
a Corportaion, C. A. SMITH, C. A. SMITH
LUMBER & MANUFACTURING COM-
PANY, a Corporation, and SIMPSON
LUMBER COMPANY, a Corporation,
Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the attorneys for the parties hereto that the following statement of evidence is a correct statement of certain evidence taken in said action; and that the court may certify the same, and it may be made a part of the testimony on appeal in said action.

W. U. DOUGLAS,
Attorney for Plaintiff.

JOHN D. GOSS,
Attorney for Defendants C. A. Smith Lumber &
Manufacturing Company, and Smith-Powers
Logging Company.

Whereupon, and on November 25th, 1913, John D. Goss was called as a witness on behalf of the defendants, and after being duly sworn, testified over the objection of the plaintiff substantially as follows:

That he was forty-four years of age, was and had been since 1907 the attorney for the defendant Smith-Powers Logging Company, and the defendant C. A. Smith Lumber & Manufacturing Company, and as such had examined the records, passed upon deeds, had charge of the local legal business of these defendants. That he examined the title to the land adjacent to the booms in controversy in this suit and found that the title to said lands was in the vendors from whom the said lands were purchased. That said land was adjacent to the booms in question; that the transactions for the purchase of said lands went through his office; that the sums of money paid therefor were paid at that time; that he was familiar with said lands and advised the defendants that it was necessary to procure this adjacent land in order to have the boom rights.

Whereupon, and on the 25th day of November, 1913, James S. Polhemus was called as a witness in behalf of the defendants, and after being duly sworn, testified in substance as follows:

That he was sixty-one years of age, resided in Portland, Oregon, was a civil engineer engaged in the civil service of the United States Government and had been so engaged for over thirty years. That during the last six or seven years he had been in the First Portland District, which includes Coos Bay. That as such engineer he examined the booms at the mouth of Coos River at different times during 1907 and 1908; that he had made these examinations because the

owners of the townsite on the north mouth had made complaints that their channel was shut off.

That he examined the boom site with Mr. Powers and some other men and noted the condition that the channel was pretty well blocked up at that time, and that the boom was right across the whole channel. That he told Mr. Powers that if he would draw his boom in so as to divide the channel about equally that he would report to his district officer that he thought that would be satisfactory, and that he approved it. And the witness further stated that he believed a permit was issued on that basis.

That Colonel Roessler was in charge of that department at that time, and that he did not know there was any requirement of the department at that time with regard to the ownership of adjacent lands. That he did not know whether or not there was such a requirement, but that there may have been; that usually the question of property rights is stipulated on the bottom of the permit. That the permit authorizes no infringement on private property rights.

On cross-examination the witness testified that he examined the booms at the request of the district officer; that he thought at that time the district officer was Col. Roessler. That the witness was on Coos Bay on some other business, and that while there the district officer requested him to investigate the complaints that had been made. That he had not examined the premises since that time, although he had been on Coos Bay in 1911. That so far as he knew

there was no requirement that the applicants for boom licenses should be the owners of the uplands. That the department did not concern itself with that.

I hereby certify that the foregoing testimony is properly a part of the record and was omitted by oversight.

Dated this March 22, 1915.

CHAS. E. WOLVERTON,

Judge.

Filed March 22, 1915.

G. H. MARSH,

Clerk.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on appeal in the case in which the Smith Powers Logging Company, a Corporation and C. A. Smith Lumber & Manufacturing Company, a Corporation, are appellants and E. W. Bernitt and Victor Wittick are appellees, in accordance with the law and the rules of this Court, and in accordance with the praecipe of the appellants filed in said case and that the said record is a full, true and correct transcript of the record and proceedings had in said Court, in accordance with said praecipe, as the same appear of record and on file at my office and in my custody;

And I further certify that the cost of the foregoing record is \$, for Clerk's fees for preparing the transcript of record and \$ for printing said record, and that the same has been paid by said appellants.

In testimony whereof I hereunto set my hand and affixed the seal of said Court, at Portland, in said District, on the day of 1915.

Clerk.

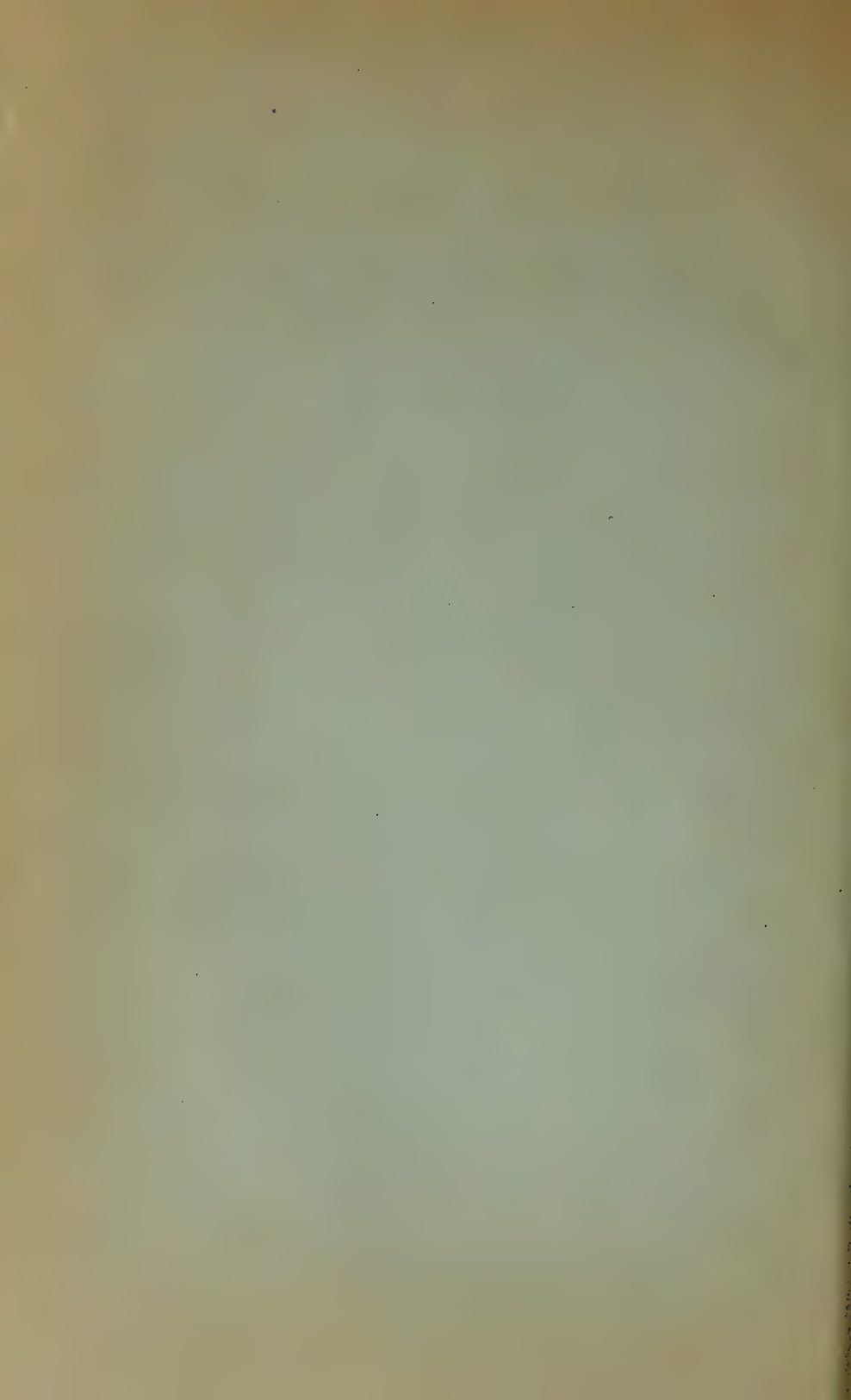
United States Circuit Court
of Appeals
For the Ninth District

SMITH POWERS LOGGING CO., a corporation, and C. A. SMITH LUMBER & MANUFACT- URING COMPANY, a corporation,	}	
		Appellants,
vs.		
E. W. BERNITT and VICTOR WITTICK,		
		Appellees.

APPELLANT'S BRIEF

JOHN D. GOSS, Marshfield, Oregon,
Attorney for Appellants.

W. U. DOUGLAS, Marshfield, Oregon.
JOHN F. HALL, Marshfield, Oregon,
WATSON & BEEKMAN, Commercial Block,
Portland, Oregon,
Attorneys for Appellees.



**United States Circuit Court
of Appeals**

For the Ninth District

SMITH POWERS LOGGING CO.,

a corporation, and

C. A. SMITH LUMBER & MANUFACT-
URING COMPANY, a corporation,

Appellants,

vs.

E. W. BERNITT and VICTOR WITTICK,

Appellees.

APPELLANT'S BRIEF

STATEMENT OF CASE

This is an appeal from a decree of the United States District Court for the District of Oregon. Appellees brought their suit in equity alleging that about the year 1882 E. B. Dean, David Willcox and C. H. Merchant, a co-partnership known as E. B. Dean & Co., of the one part, and E. W. Bernitt, Wm. Klahn, George Wulff and David Young, of the other part, entered into a partnership agreement, in pursuance of which a certain log boom was constructed partly on lands owned by the said E. B. Dean &

Co., and partly on other lands not then so owned.

The complaint further alleged that the said Bernitt, Klahn, Wulff and Young were to do all the rafting, for which a charge was exacted in addition to the boomage charge. That E. B. Dean & Co., were to have a one-half interest in the boomage charge, after paying half the cost of maintenance, and each of the other parties were to receive a one-eighth interest in the boomage charge, after each contributing one-eighth of the cost of maintenance.

The complaint further alleged that by numerous sales and transfers set forth in the complaint, Bernitt & Wittick succeeded to the interests of Bernitt, Klahn, Wulff and Young. That about the year 1897 the firm of E. B. Dean & Co., was dissolved by reason of the death of David Willcox, and the partnership property of said E. B. Dean & Co., was sold to Dean Lumber Co., a California corporation; that thereafter said partnership property of E. B. Dean & Co., was sold and transferred to C. A. Smith, one of the defendants in the present suit; that said C. A. Smith thereafter sold his interest in the tidelands and boom to the defendant Smith-Powers Logging Company; that upon the sale and purchase by the Dean Lumber Company from E. B. Dean & Co., said Dean Lumber Company continued to act in the joint operation and management of said boom in conformity with the said alleged partnership agreement, and that said C. A. Smith and Smith-Powers Logging

Company also continued to act in the joint management, operation, control, possession and ownership of said boom and property with the plaintiffs up to and until March, 1909, at which time the Smith-Powers Logging Company claimed to own said boom, and that since June, 1909, the Smith-Powers Logging Company has taken exclusive possession of said boom, and prevents the plaintiffs from using the same, or any portion thereof.

The complaint further alleged a secret agreement or understanding between C. A. Smith and the Smith-Powers Logging Company and C. A. Smith Lumber & Manufacturing Company to prevent the plaintiffs from using the boom, and that they refused to account to the plaintiffs or pay their proportion of the earnings of the boom.

The complaint further sets forth that the plaintiffs are entitled to certain amounts of money for boomage and rafting, and asks for an accounting and judgment for any amount found to be due, and further asks that a receiver be appointed for said boom, and that if the court find that said property cannot be partitioned without materially destroying its value, that said receiver be ordered to sell the premises and property.

The answer admits that about the year 1882 E. B. Dean, David Willcox and C. H. Merchant were co-partners, doing business under the firm name and style of E. B. Dean & Co., but denies that the said co-partnership ever entered into any partnership

agreement with Bernitt, Klahn, Wulff and Young as set forth in the complaint and alleges that the agreement was merely that the said Bernitt, Klahn, Wulff and Young were to be allowed the use of said boom, and to go in said booms and remove logs and piling stored therein for various persons and companies doing business upon the waters of Coos Bay, and to take and raft away logs and pilings so caught in said boom, and for said privilege and for said uses of said boom the parties last named were to, and did, assist with their labor, in a small measure, in the erection of said booms, and were to, and did, keep said booms in such state of repair as to permit of its continued use, and that the said Bernitt, Klahn, Wulff and Young were associated together in said use of said boom, and were accustomed to and did charge for all logs or timber caught therein the sum of twelve and one-half cents per thousand feet, board measure, and one-eighth of a cent per lineal foot for piling for so catching, storing and sorting said logs, and that the owners of all said logs and piling paid to E. B. Dean & Co., a like sum of twelve and one-half cents per thousand feet, board measure, for all logs, and one-eighth of a cent per lineal foot for all piling, the sums so paid to E. B. Dean & Co., being as rental for the use of said boom.

The answer further alleges that in the various transfers by which Bernitt & Wittick claimed their interest, the several persons so purchasing their interests mutually understood that the parties pur-

chasing could not without consent of E. B. Dean & Co., continue to use said boom in connection with the rafting and logging business carried on by said Bernitt, Klahn, Wulff and Young; and their successors, and the said several parties to said purchasers and sales never at any time claimed any partnership with E. B. Dean & Co., but sold and claimed to sell only logging gear, boats, ropes and similar appliances, and that none of them ever signed any articles of partnership or considered themselves or acted as partners of the said E. B. Dean & Co.

The answer admits that in 1897 the firm of E. B. Dean & Co., was dissolved by reason of the death of David Willcox, and that thereafter the partnership property of said E. B. Dean & Co., was sold and transferred to the Dean Lumber Company, a California corporation, who transferred the same to C. A. Smith; and alleges that the said C. A. Smith thereafter sold all of the said partnership property to the Smith-Powers Logging Company.

The answer further denies that the Dean Lumber Company ever acted with Bernitt & Wittick, or their grantors, in the joint operation and management of said boom, and in conformity with any partnership agreement, and alleges that the said Dean Lumber Company, after purchasing said partnership property from E. B. Dean & Co., merely allowed the plaintiffs and their original grantors to use said boom pursuant to the agreement set forth in the answer, and not in conformity or attempted con-

formity to any partnership agreement whatsoever.

The answer further denies that C. A. Smith or the Smith-Powers Logging Company ever acted with Bernitt & Wittick in the joint management, operation, control, possession or ownership of said boom, and alleges that said C. A. Smith and Smith-Powers Logging Company had no notice, knowledge or intimation that the said Bernitt & Wittick ever claimed or pretended to have any interest whatsoever in said booms until the month of October, 1907, and immediately upon hearing of such claim, the said Smith-Powers Logging Company, which was then in the possession, control and management of said property, notified plaintiffs Bernitt & Wittick that they had no right, title, interest or ownership in said boom; that said C. A. Smith never controlled or operated said boom, but at all times while the title to the same rested in him, entrusted the management and control of said boom to the Smith-Powers Logging Company, and alleges that after said boom was purchased by said C. A. Smith, Bernitt & Wittick claimed and represented to said Smith that they had been using said boom and rafting logs therefrom under an arrangement with the former owners thereof substantially as set forth in the answer.

The answer admits that C. A. Smith is a director and is president of the Smith-Powers Logging Company, and also of the C. A. Smith Lumber & Manufacturing Company, but denies that he is the managing owner of either of said corporations, and al-

leges that the defendant C. A. Smith Lumber & Manufacturing Company at no time owned or claimed, and does not now own or claim any right, title or interest in or to said boom or said property, or any part thereof.

The answer further denied that there was any secret agreement or understanding to prevent the plaintiffs from using said property or property rights, and denied that plaintiffs were entitled to any accounting or any of the sums claimed in the complaint.

The answer further alleges that neither Bernitt & Wittick, or their grantors, or the said E. B. Dean & Co., or Dean Lumber Company, ever had or received, and that there was never issued to them, or to anyone for them, or otherwise, any permit from the War Department of the United States, or from any lawful authority, for the erection or maintenance of said boom, or any portion thereof, or any of the piling or other property constituting said boom, and that said booms other than those erected by the defendants were erected and maintained in the navigable waters of Coos Bay and of Coos River in Coos County, Oregon, contrary to and in violation of the laws of the United States, and particularly of an Act of Congress, passed September 19, 1890, and acts amendatory thereto, and were at all times illegal, unauthorized and unlawful; and the answer further alleged that at the time the boom was purchased by C. A. Smith, and at the time Smith-Pow-

ers Logging Company took possession thereof, said piling, dolphins and boom sticks constituting said boom, were decayed, dilapidated and in such a state of disrepair that they were practically valueless, unsafe and unsuitable for the purposes for which they were intended. That the plaintiffs had failed and neglected to repair or maintain said boom, and that since the Smith-Powers Logging Company took possession thereof, the said defendants had obtained proper and legal permits from the proper authorities of the United States Government for the maintenance of booms, and that pursuant to such permits, had erected proper and legal booms and necessarily expended therefor the sum of \$9,891.02; that as a condition precedent to allowing the erection of said boom, the War Department of the United States required the said Smith-Powers Logging Company to remove from the channel of said Coos River, dolphins, cribs and piling whatsoever placed in said channel and forming a portion of said former illegal boom, and that in so doing and complying with said conditions and removing the said obstructions, said Smith-Powers Logging Company necessarily expended the sum of \$600; that in order to secure a permit for the erection of said boom, it was necessary that the Smith-Powers Logging Company purchase, and said Company did purchase, tidelands and adjacent high lands, of the value of \$12,615.50, and that said expenditure was necessary in order to erect and maintain said boom.

The answer further alleged that the old boom had

been necessarily removed by the Smith-Powers Logging Company in improving said property and in erecting proper and legal booms thereon, and that no portion of the former booms, or the materials or piling constituting the same, remained in use or standing upon said property except a few piles not worth more than \$300.00.

The answer further alleged that under the statutes of Oregon, all contracts or agreements relating to land except as therein stated are required to be reduced to writing, and signed by the party or parties to be bound thereby, and that there has never been any such agreement or writing between the plaintiffs or the plaintiffs' grantors and said E. B. Dean & Co., or Dean Lumber Company, or any of these defendants, and alleges that any such partnership agreement or any transfers purporting to convey any interest in said tidelands or boom erected thereon was void.

The answer further set forth that none of said instruments of conveyance between the plaintiffs and their grantors have been recorded. That the said C. A. Smith purchased said real property without knowledge, notice or intimation of any rights, claims, interest or equities of the plaintiffs, or either of them, either as co-partners with said Dean Lumber Company, E. B. Dean & Co., or otherwise. That the public records show Dean Lumber Company to be the absolute owners in fee simple of said property and said Smith purchased the same for a valuable

consideration, and that a proper conveyance thereof was duly executed by Dean Lumber Company to said Smith, and was forthwith and regularly recorded, and that said Smith was in all respects an innocent purchaser of said property, and said Smith-Powers Logging Company in like manner purchased and paid for said lands, tidelands, boom and property from said C. A. Smith, and went into possession thereof without any notice, knowledge or intimation whatever on the part of the plaintiffs that they or either of them owned or claimed any right, title or interest in and to said lands or the boom erected thereon, and that said Smith-Powers Logging Company was an innocent purchaser thereof for value; and further alleges that plaintiffs by their neglect to set up any claims to said property, or to inform the defendants of their alleged rights in it, are estopped from now setting up any such claims.

SPECIFICATION OF ERRORS

1.

The court erred in finding that it was unnecessary to decide the character and nature of the interest of the plaintiffs in said booms.

2

The Court erred in allowing any evidence or considering complainant's Exhibits 1, 2. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 30 and each of them.

3.

The Court erred in finding that the plaintiffs E. W. Bernitt, William Klahn, George Wulff and David Young entered into an oral partnership with E. B. Dean, David Willcox, and C. H. Merchant, partners doing business as E. B. Dean and Company, in the year 1882, or at all.

4.

The Court erred in finding that the plaintiffs E. W. Bernitt, William Klahn, George Wulff, and David Young entered into a joint agreement with E. B. Dean, David Willcox and C. H. Merchant, partners doing business as E. B. Dean and Company, in 1882, or at all.

5.

The Court erred in finding that the plaintiffs E. W. Bernitt, William Klahn, George Wulff and David Young entered into an agreement with E. B. Dean, David Willcox and C. H. Merchant, partners doing business as E. B. Dean and Company, for the construction and operation of them jointly of certain log booms and dolphins, for the catching and storing of saw logs, piles and other timber.

6.

The Court erred in finding that such agreement was for the construction and operation of log booms upon land at the time thereof owned or controlled or thereafter to be acquired by the firm of E. B. Dean and Company.

7.

The court erred in finding that there was an agreement between E. W. Bernitt, William Klahn, George Wulff, and David Young and the firm of E. B. Dean and Company whereby the former were to make up the rafts and transport the same to various points on Coos Bay.

8.

The Court erred in finding that there was an agreement between E. W. Bernitt, William Klahn, George Wulff and David Young whereby a boomage charge of twenty-five cents per thousand feet, board measure, was to be made for catching logs in the Coos River booms, and one-eighth of one per cent per lineal foot for piling caught therein, of which E. B. Dean and Company were to receive one-half and said other parties one-eighth each.

9

The Court erred in holding that all parties were to contribute to the cost and maintenance of said boom in like proportion.

10.

The Court erred in finding that in addition to the boomage, Bernitt, Klahn, Wulff and Young were to be allowed to make a charge of thirty-five cents per thousand feet for saw logs, and one-half of one per cent per foot for piling for making it up into rafts and transporting the same and the said E. B. Dean and Company was to receive no part thereof.

11.

The Court erred in finding that the said log booms and the dolphins were constructed in accordance with and pursuant to such agreement.

12.

The Court erred in finding that E. B. Dean and Company contributed one-half for the cost of constructing the said log boom and dolphins and said parties contributed the other half.

13.

The Court erred in finding that from the time said booms were constructed the parties and their successors in interest continued to operate the same under the terms of such agreement found by the Court, until defendant Smith-Powers Logging Company took exclusive possession and control thereof.

14.

The Court erred in finding that the defendant Smith-Powers Logging Company took exclusive possession and control of said booms in June, 1909.

15.

The Court erred in finding that plaintiffs E. W. Bernitt, Victor Wittick have duly succeeded through mesne and intermediate transfers to the original interest of William Klahn, E. W. Bernitt, George Wulff, and David Young in said booms.

16.

The Court erred in finding that the plaintiffs are the present owners of equal shares of said interest

in said booms.

17.

The Court erred in finding that the plaintiffs were the owners of such shares during the years 1907, 1908 and 1909.

18.

The Court erred in finding that the defendants C. A. Smith Lumber and Manufacturing Company and Smith-Powers Logging Company assumed and exercised the rights of ownership of said E. B. Dean and Company in said interest in said boom, and said tide lands from and after February, 1907, in conjunction with the plaintiffs.

19.

The Court erred in finding that C. A. Smith is the controlling stockholder in the defendant C. A. Smith Lumber and Manufacturing Company.

20.

The Court erred in finding that the defendant C. A. Smith Lumber and Manufacturing Company had dominated and dominates the defendant Smith-Powers Logging Company.

21.

The Court erred in finding that all the persons and corporations succeeding to and owning the interest of E. B. Dean and Company in said booms, including the defendants C. A. Smith, C. A. Smith Lumber and Manufacturing Company, and Smith-Powers Logging Company have recognized and act-

ed under said agreements so found to exist by the Court.

22.

The Court erred in finding that all the persons and corporations succeeding to and owning the interest of said E. B. Dean and Company in said boom, including defendant C. A. Smith, C. A. Smith Lumber and Manufacturing Company, and Smith-Powers Logging Company have dealt with the plaintiff E. W. Bernitt and his copartner thereto according to and under the terms of said agreement so found by the Court to have been made.

23.

The Court erred in finding that the defendants C. A. Smith Lumber and Manufacturing Company and Smith-Powers Logging Company have expressly recognized the rights and privileges of the plaintiffs.

24.

The Court erred in finding that the defendant C. A. Smith Lumber and Manufacturing Company and Smith-Powers Logging Company consented to the use and operation of said booms by the plaintiffs during the logging season of 1907 and 1908 conformably to said original agreement.

25.

The Court erred in finding that the defendant C. A. Smith Lumber and Manufacturing Company and Smith-Powers Logging Company permitted the use

and operation of said booms by the plaintiffs during the rafting and logging operations of 1908 and 1909.

26.

The Court erred in finding that said defendants ousted the plaintiffs in the use and occupation of said booms in June, 1909.

27.

The Court erred in finding that at the time of the ouster of the plaintiffs said booms were of the reasonable value of Two Thousand Dollars.

28.

The Court erred in finding that One Thousand Dollars is a reasonable value of the plaintiffs' interest in said booms.

29.

The Court erred in finding that the interests of the plaintiffs in said booms was irrevocable.

30.

The Court erred in finding that the defendant C. A. Smith Lumber and Manufacturing Company and Smith-Powers Logging Company rendered themselves liable to pay plaintiffs for the reasonable value of their interest in said booms.

31.

The Court erred in finding that the plaintiffs were entitled to an accounting for boomage charges on logs and other timber caught and stored in said booms, and for further charges for logs and other

timber by them and transported or transferred to the mills of the C. A. Smith Lumber and Manufacturing Company and the Simpson Lumber Company during the logging and rafting season of 1908 and 1909.

32.

The Court erred in finding that during the logging season of 1908 and 1909 the plaintiffs caught and stored in said boom for said Simpson Lumber Company 4,045,273 feet of logs.

33.

The Court erred in finding that during the season of 1908 and 1909, the plaintiffs rafted and transported to the mill of the Simpson Lumber Company, 2,966,771 feet of logs.

34.

The Court erred in finding that the plaintiffs are entitled to one half of the boomage charges, viz., twelve and one-half cents per thousand feet upon 4,045,273 feet of logs.

35.

The Court erred in finding the plaintiffs entitled to a rafting charge of thirty-five cents per thousand feet upon 2,966,771 feet of logs transported to the mill of the Simpson Lumber Company.

36.

The Court erred in finding the plaintiffs entitled to \$18.93 for piles boomed and rafted.

37.

The Court erred in finding the plaintiffs entitled to \$1562.96 for logs and piles boomed and rafted for the Simpson Lumber Company.

38.

The Court erred in finding that the plaintiffs during the logging season of 1908 and 1909 caught in said booms 1,924,460 feet of logs for the defendant C. A. Smith Lumber and Manufacturing Company.

39.

The Court erred in finding that the plaintiffs rafted and transported 1,924,460 feet of logs to the mill of the defendant C. A. Smith Lumber and Manufacturing Company.

40.

The Court erred in finding that the plaintiffs were entitled to one-half of the boomage charge, viz., twelve and one-half cents per thousand feet upon said 1,924,460 feet of logs.

41.

The Court erred in finding that plaintiffs were entitled to rafting charges of thirty-five cents per thousand feet on said 1,924,460 feet of logs.

42.

The Court erred in finding that plaintiffs were entitled to \$10.75 for booming and rafting piling.

43.

The Court erred in finding plaintiffs entitled to \$924.58 from the defendant C. A. Smith Lumber and

Manufacturing Company.

44.

The Court erred in finding that plaintiffs were entitled to one-half the boomage charge, viz., twelve and one-half cents per thousand feet on four thousand logs averaging nine hundred fifty feet to the log.

45.

The Court erred in finding that any such logs passed through said boom during said logging and rafting season of 1908 and 1909.

46.

The Court erred in finding that said sum of \$475.00 has been collected and retained by the defendant C. A. Smith Lumber and Manufacturing Company, and the Smith-Powers Company.

47.

The Court erred in finding the plaintiffs entitled to recover from the Smith-Powers Logging Company and the C. A. Smith Lumber and Manufacturing Company the sum of \$3667.34.

48.

The Court erred in entering a decree herein in favor of the plaintiffs and against the defendants.

49.

The Court erred in ordering and entering judgment herein for costs in favor of the plaintiffs and against the defendants.

21

50.

The Court erred in entering judgment herein in favor of the plaintiffs and against the defendants in the sum of \$3,667.34.

51.

The Court erred in entering any decree whatever upon the findings in this suit.

52.

The Court erred in not entering a decree herein in favor of the defendant C. A. Smith Lumber and Manufacturing Company, and Smith-Powers Logging Company, and against the plaintiffs upon the findings herein.

53.

The Court erred in not entering a decree and judgment in favor of the defendants and against the plaintiffs for the costs of this suit.

54.

The Court erred in not dismissing this cause as one not cognizable in equity.

55.

The Court erred in not finding herein that the complainants E. W. Bernitt and Victor Wittick have been notified that the defendant Smith-Powers Logging Company took exclusive possession of said boom in question in December, 1908.

56.

The Court erred in not finding herein that after December 20, 1908, the plaintiffs and each of them

were ousted of possession of said boom.

57.

The Court erred in not finding that on December 20, 1908, defendant Smith-Powers Logging Company took exclusive possession of said boom, and thereafter continuously maintained possession and control thereof.

58.

The Court erred in not finding that the plaintiffs, and each of them had no claim or claims whatsoever, for boomage or participation in the boomage from said boom based upon logs or piling caught or handled therein during the logging season of 1908 and 1909.

59.

The Court erred in not finding that a complete change in said booms was rendered necessary by the requirements of the engineers of the War Department in the summer of 1908.

60.

The Court erred in not finding that in order to legally maintain said booms during and after the summer of 1908, it was necessary to expend a greater sum of money thereon in conforming the same to the requirements of the government engineers.

61.

The Court erred in not finding that it was necessary in order that said booms catch, hold, handle and accommodate the logs naturally coming into the

same during the logging season of 1908 and 1909 and the subsequent logging seasons that said booms be rebuilt and enlarged and extended.

62.

The Court erred in not finding that it was necessary in order to properly maintain and continue said booms that the owners thereof purchase the lands known as the McIntosh Land, and expend therefor the sum of Two Thousand Dollars.

63

The Court erred in failing to find that it was necessary in order to legally maintain and continue said booms, to purchase the land known as the Devers tide lands, and to expend therefor the sum of \$2250.00.

64.

The Court erred in failing to find that it was necessary in order to continue and maintain said booms to purchase the land known as Holland Island, and to expend therefor the sum of \$2010.50.

65.

The Court erred in failing to find that it was necessary in order to continue said booms to purchase other tidelands, adjacent thereto and to expend therefor the sum of \$1200.00.

66.

The Court erred in failing to find that it was necessary in order to properly maintain said boom and accommodate and hold the logs coming into the

same to purchase the tidelands upon which the extension or pocket boom at the end of said lower boom was built and that it was necessary to expend therefor and there was expended by the defendant Smith-Powers Logging Company therefor \$7,155.00.

67.

The Court erred in failing to find that there was expended by the defendant Smith-Powers Logging Company, in maintaining, repairing, and conducting said boom, during the logging season of 1907 and 1908, the sum of \$1350.47.

68.

The Court erred in failing to find that there was necessarily and properly expended by the Smith-Powers Logging Company in maintaining, repairing and conducting said boom in the year 1909 the sum of \$2,247.23.

69.

The Court erred in failing to find that there was the necessary expenses of maintaining and repairing, and conducting said booms expended by the Smith-Powers Logging Company for the years 1907, 1908 and 1909, were and are properly chargeable against said booms.

70.

The Court erred in failing to find that the defendant Smith-Powers Logging Company should be credited as against the complainants with all sums necessarily expended by them in the maintenance and repair of said booms, during any time that the

complainants had or were entitled to any interest therein.

71.

The Court erred in failing to find that the sum of \$2010.00 expended by the defendant Smith-Powers Logging Company in settling the claim for the fishing rights at and opposite the Creamery Boom was a necessary expense of maintaining and conducting said boom.

72.

The Court erred in failing to find that the agreements between the complainants and E. B. Dean constituted a mere working agreement or working interest of the complainants in said booms.

73.

The Court erred in failing to find that the interests of the complainants in said booms were terminable at any time, to the said E. B. Dean and Company by the sale or transfer of said booms.

POINTS AND AUTHORITIES

Point I.

THE STATUTE OF FRAUDS AND THE RECORDING ACT APPLY TO A BOOM AND THE TIDE LANDS ON WHICH IT IS CONSTRUCTED AS FULLY AND TO THE SAME EXTENT AS TO ANY OTHER REAL PROPERTY.

The rule being universal, no citation of authorities is necessary to support the proposition that

wharves, piers, and booms and such similar permanent improvements erected on land are real property, and this proposition seems thus far to have been conceded by all parties to the present suit. It is conceded that the tide lands on which this boom was constructed belonged to E. B. Dean and Co. at the time appellee's predecessors claim to have acquired an interest therein. How and in what manner did the partnership of E. B. Dean and Co. convey to Bernitt, Klahn, Wulff and Young their alleged interest in this real property? Certainly not by any conveyance in writing as required by the Oregon Statute, for plaintiffs' only contention has been that such interest was acquired by an alleged co-partnership agreement between the co-partnership of E. B. Dean and Co. and Bernitt, Klahn, Wulff and Young.

The Oregon Statute referred to is Section 808 of Lord's Oregon Laws, which, so far as applicable hereto, is as follows:

“In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law:

“1. An agreement that by its terms is not to

be performed within a year from the making thereof.

* * * * *

“6. An agreement for the leasing for a longer period than one year, *or for the sale of real property, or of any interest therein.*”

The alleged agreement was clearly void because it came within subdivision 1 above quoted. Bernitt testified at page 142 that the agreement was “that we were to do the rafting *for all time.*” It was then an agreement which by its terms was not to be performed within a year from the making thereof.

It was also void in that, by the court’s finding that it operated to convey title to some part of the real property to Klahn, Bernitt, Wulff and Young, by reason of the fact that it was not in writing as required by subdivision 6 above quoted.

The bills of sale or written transfers by which Bernitt, Klahn, Wulff and Young transferred their interests to others clearly could not operate to deprive E. B. Dean & Co., or its successors of title to any part of its real estate. It is nowhere contended that there was ever any written conveyance from E. B. Dean & Co. The unrecorded bills of sale were merely the instruments by which appellees’ predecessors transferred their respective logging and rafting apparatus, boats and appliances, and such interest as they claimed or alleged themselves to have in the real property in question.

Plaintiffs did not contend nor has there ever been

any claim made by them that any conveyance of any kind transferring title from E. B. Dean and Company to them or to any of their predecessors, has ever been recorded, as required by Section 7129 of Lord's Oregon Laws, which reads as follows:

“Every conveyance of real property within this state wherever made, which shall not be recorded as provided in this title within five days thereafter, shall be void against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded.”

It is undisputed that E. B. Dean and Co. duly transferred all of its property to the Dean Lumber Company and that the Dean Lumber Company duly transferred the property in question to C. A. Smith, A. J. Sherwood, of Coquille City, Oregon, acting as attorney for Mr. C. A. Smith, at or about the time of the purchase of the properties of the Dean Lumber Company by Mr. Smith, examined the title of the Dean Lumber Company and found nothing of record as against the boom property here in question, or the lands adjacent thereto, and standing in the name of the Dean Lumber Company, and he so reported to Mr. Smith. (T. p. 436.)

There is no conflict in the evidence on these matters and we respectfully urge that any such agreement as is relied on by appellees is wholly void because not to be performed within one year, and, in so far as it purports to deprive E. B. Dean & Co., or

its successors of title to the boom or the land on which it is situated, is void because not in writing and recorded as required by the Oregon statutes.

POINT II.

THE TESTIMONY WHOLLY FAILS TO SHOW ANY CO-PARTNERSHIP AGREEMENT BETWEEN THE PARTNERSHIP OF E. B. DEAN AND COMPANY ON THE ONE HAND AND APPELLEES' ALLEGED PREDECESSORS, BERNITT, KLAHN, WULFF AND YOUNG ON THE OTHER.

Although in the opinion of the Court below, (T. p. 77), the Court says that, ((T. p. 80), it is wholly unnecessary to determine the nature of the interest that plaintiffs possessed in the booms, the decree declares there was an oral partnership, or a joint venture agreement between the partnership of E. B. Dean and Company and Bernitt, Klahn, Wulff and Young, (T. p. 87).

We respectfully submit that this is not such a case as can be disposed of by the bare assertion that it is not necessary to determine what interest the appellees have in this controversy. Our contention is and has been, and we think the proofs clearly show that Bernitt, Klahn, Wulff and Young, had merely such an agreement as is alleged in defendant's answer, (T. p. 51), viz., that E. B. Dean and Company was to permit them to use the boom for the catching, and storing of logs belonging to various persons about Coos Bay, and to raft away the logs and piling so

caught in said boom and for said privilege and said use of said booms, the said E. B. Dean and Company were to receive one-half of the boomage charges. In this connection, it becomes necessary to call the Court's attention somewhat at length to the testimony on this point.

Bernitt and Wulff were the only ones of the original parties to this alleged partnership agreement who testified and it is manifest that, the alleged agreement being oral, testimony from any other source would be but hearsay. Clearly there is nothing in the testimony of either Wulff or Bernitt to sustain a finding of a partnership agreement, of of a conveyance of any kind to them by E. B. Dean and Co., of any part of the property in question. Wulff testified that:

“The agreement was the raftsmen were to get the rafts out and do all the rafting for twenty-five cents per thousand, and for catching logs in the boom, another twenty-five cents; that of the last twenty-five cents, the Mill company took one-half and the raftsmen one-half.” (T. p. 135-136).

“That personally he didn't have anything to do with making the original bargain with E. B. Dean and Co., and never talked with any of the members of the firm about it; that he never made any agreement or transfer in writing with Dean and Company, and did not remember getting or giving any bill of sales from Young or to

Haglund and Mattson; that he bought out Young for twelve hundred dollars, including all the rafting gear, boats, etc., and bought and sold without personally getting Dean and Company's consent." (T. p. 136.)

"That they did not consider the investment in the boom apart from the rafting gear; that the rafting gear was only worth twelve hundred dollars and in fixing the price at twenty-four hundred dollars, they figured the whole thing together, and *that nothing was ever said by him about being partners therein*, but something was said between Young and E. B. Dean and Company, the particulars of which he did not know." (T. p. 137).

"And when Klahn and Bernitt bought in, there was no separate agreement entered into, and no written agreement was ever made." (T. p. 137).

So much for the testimony of Wulff, one of the original partners to the alleged partnership agreement. It seems obvious from this testimony there was nothing more than a mere working arrangement by the owners of the boom and the land on which it was constructed, (E. B. Dean and Co.), and the two sets of rafting partners, Klahn & Bernitt, and Wulff & Young, that the latter were to be permitted to use the boom under certain terms and conditions.

Bernitt testified that E. B. Dean and Company and Wulff and Young started and built the boom and

the upper boom was nearly completed when C. H. Merchant asked Klahn and Bernitt if they would "go in with them." (T. p. 138).

"That they might have talked with Wulff and Young, but nothing particular, but they seemed to be willing to allow the deal." (T. p. 139).

Where is the original partnership agreement? What was its terms? Where and on what basis was there a meeting of the minds, when Bernitt and Klahn talked "nothing particular" with Wulff and Young?

Bernitt then purchased Klahn's interest by "bill of sale," (T. p. 139), which described the property transferred as an undivided half interest in the "personal property" owned by the "firm of Klahn & Bernitt", and "any and all interest of whatsoever nature which the said W. Klahn has in and to certain booms" and "any and all interest which the said W. Klahn has in and to the lands on which the same is situated, together with the right to apply to the proper parties for a deed." Clearly there is nothing in this instrument which would operate to deprive the E. B. Dean and Company of title to any part of its land or the boom constructed thereon, any more than a bill of sale purporting to convey to Bernitt the Brooklyn Bridge, together with the right to apply to the proper parties for a deed, could have given him title thereto.

It is obvious from this document that there was no partnership agreement then existing between E. B.

Dean and Company, on one side and Bernitt, Klahn Wulff and Young on the other. On the contrary, there was one partnership of E. B. Dean and Company, another partnership of Wulff and Young, and still another, called in the bill of sale, "the firm of Klahn & Bernitt."

It is also obvious that E. B. Dean and Company did not convey to any of the four, any interest in the real property. That E. B. Dean and Company, and its successor, the Dean Lumber Company, did not convey, or intend to convey any interest in the real property in question, viz., the boom and the land on which it was constructed further appears at many other places in the record, notably at Page 183, where Hillstrom testified that when he purchased his interest from Kruger, he and Kruger went to an attorney's office, (J. W. Bennett), and Mr. Bennett asked Kruger if he had explained to Hillstrom that the Dean Company would not give any deed, and Kruger answered, "Yes, I explained that", and at page 289 of the record, Kruger testified that the attorney (J. W. Bennett) made the remark when he made out the bill of sale, "You fellows are buying and selling and you don't know what you are buying and you boys got nothing to show for it"; and at page 184, Hillstrom testified that "he didn't explain to Anderson Emmet at the time he bought, that Dean and Company would not give a deed or paper of any kind to the property, because Emmet was the man witness was working for and knew more about it than witness did."

As will be seen from all the testimony, this remark of Mr. Bennett's aptly describes the various dealings between the different sets of raftsmen. They were buying and selling, but didn't know what. Like Topsy, the alleged partnership agreement and alleged interest in the real property "just grew."

Kruger also testified, (T. p. 289), that when he purchased his interest from Mattson, he (Matson), didn't claim he was selling any "interest in any partnership with Merchant or with the Dean Lumber Company." That there was only a working interest such as is alleged in the answer and that there was at that time two separate partnerships among the raftsmen, as indicated by the "Klahn & Bernitt" transaction is further shown by Kruger's testimony (T. p. 291), where he says he was in partnership with Alfred Haglund, and that Bernitt had his own gear in which Kruger and Haglund had no interest. Getting back to Bernitt's testimony, we find that he testified concerning the ownership of the land as follows:

"Q. Did he say who was to hold the title to the land, pay the taxes and the cost and expense of maintaining the boom?"

After first giving an answer not responsive to the question, the question was repeated and he gave the following answer:

"A. The land there was nothing more said about."

This is absolutely all the testimony in the record

by any of the parties to the alleged original agreement. Of course the record is replete with proof that the raftsmen operated the boom under some sort of an agreement under which they received a certain amount for boomage and a certain amount for rafting, and that half of the boomage charge went to Dean and Company, and its successors, but the inferences to be drawn therefrom tend more strongly to prove defendant's claim of a mere operating agreement than plaintiff's claim of a partnership agreement and partnership ownership of the property itself.

The burden of proving the alleged partnership agreement and partnership ownership was upon plaintiffs and we most earnestly insist that no court can fairly say from this record that plaintiffs have sustained that burden.

The complaint alleges a partnership agreement between a partnership and four individuals. (Par. IV of Complaint, T. p. 3). Manifestly if there was any co-partnership at all, the individual members of E. B. Dean & Co., were the co-partners of Bernitt, Wulff, Klahn and Young. The complaint alleges that the firm of E. B. Dean & Co., was dissolved in 1897 by the death of David Willcox (Complaint Par. VII, T. p. 6), and this is admitted by the answer, (Par. VIII, T. p. 54). By the same event, the death of Willcox, the firm of Dean, Willcox, Merchant, Bernitt, Klahn, Wulff and Young was likewise dissolved. A sale by one partner of his interest without

the consent of the other partners dissolves the partnership.

30 Cyc. 653, citing many cases, including *Meysenberg vs. Littlefield*, 135 Fed. 184.

Klahn, Wulff, Young and all their successors sold and resold their interests in the so-called partnership without the consent and without even consulting the others. Any one of these sales was in and of itself sufficient to dissolve the so-called partnership agreement.

POINT III.

EVEN IF THERE WAS SUCH A CO-PARTNERSHIP AS IS ALLEGED IN THE COMPLAINT AND FOUND BY THE DECREE, THE SALE OF THE PROPERTY TO C. A. SMITH, A BONA FIDE PURCHASER, PASSED ALL THE TITLE OF ALL THE PARTNERS.

The plaintiffs' case as shown by the complaint was based on the co-partnership agreement between E. B. Dean and Company, a co-partnership, and Bernitt, Klahn, Wulff and Young, and the Court's decree is in part as follows:

"That about the year 1882, the plaintiffs, E. W. Bernitt, Wm. Klahn, George Wulff and David Young entered into an oral partnership or a joint venture agreement with E. B. Dean, David Willcox and C. H. Merchant, partners doing business as E. B. Dean and Company." (T. p. 87.)

The record clearly shows and it is conceded by all parties that the title to all the lands in question was in the name of E. B. Dean and Company, and by them transferred to its successor, the Dean Lumber Company. This transfer from E. B. Dean and Company to the Dean Lumber Company was with the consent and approval of all the raftsmen for many of them testified concerning it and there is nothing in the record to show that they objected in any manner. On the contrary, their consent and ratification is clearly shown throughout the record.

In such circumstances the rule is clear that the sale is binding upon all of the parties. Concerning this, Cyc. lays down the rule as follows:

“ If, however, the conveyance by one partner was made in the presence or with the consent of his co-partners, or has been ratified by them, it will be binding upon all.”

30 Cyc 494.

In support of this text, the following cases are cited:

Arkansas.—Ferguson vs. Hanauer, 56 Ark. 179; 19 S. W. 749.

Lee vs. Onstott, 1 Ark. 206.

Deleware.—Little vs. Hazzard, 5 Harr. 291.

Iowa.—Haynes vs. Seachrest, 13 Iowa 455.

Louisiana.—Wild vs. Peter's, 1 La. Ann. 432.

Mississippi.—Shirley vs. Ferne, 33 Miss. 653; 65 Am. Dec. 375.

New York.—Lawrence vs. Taylor, 5 Hill 107.

Texas.—Frost vs. Wolf, 77 Tex. 455; 14 S. W. 440; 19 Am. St. Rep. 761.

Baldwin vs. Richardson, 33 Tex. 16.

Realty Co. vs. Pounds, 128 App. Div. 91; 112 N. Y. Supp. 433.

Guevara vs. De Ocampo, 7 Phillipine 104.

If the plaintiffs ever had any interest in or valid claim to any of the real property of E. B Dean and Co., they never claimed same or demanded any deed. On the contrary, they knew, as we have pointed out, that the Dean Company would not give any deed. They permitted, consented to and ratified the sale by E. B. Dean and Company to the Dean Lumber Company, and can not now question that such sale operated to transfer to the Dean Lumber Company all right, title and interest of all the alleged partners. Furthermore, they allowed the legal title to stand in the name of the Dean Lumber Company. That Company, in turn, conveyed to C. A. Smith.

Cyc. lays down the further rule:

“If firm real estate stands in the name of one of the partners, he may make a valid conveyance thereof; And a bona fide purchaser from him will hold *free from the equities of his co-partners.*”

30 Cyc. 494.

Citing:

Robinson Bank vs. Miller, 153 Ill. 244; 38 N. E. 1078; 46 Am. St. Rep. 883; 27 L. R. A. 449.

Clarke vs Allen, 34 Iowa 190.

Rivarde vs. Rousseau, 7 La. Ann. 3.

Tillinghost vs. Champlin, 4 R. I. 173; 67 Am.
Dec. 510.

The same rule is laid down in Am. & Eng. Enc. of Law, second edition, as follows:

“It has been held that where a member of a partnership holds the legal titles to a partnership property, one who purchases such property from him, bona fide for value and without notice, will take the title thereto, discharged from any trust in favor of the firm or its creditors.”

Am. & Eng. Enc. of Law, Second Edition,
Volume 22, page 95, citing:

McNeil vs. First Cong. Soc. 66 Cal. 105.

Robinson Bank vs. Miller, 153 Ill. 244; 46 Am.
St. Rep. 883.

McMillan vs. Hadley, 78 Ind. 590.

Hiscock vs. Phelps, 49 N. Y. 97.

Page vs. Thomas, 43 Ohio St. 38; 54 Am. Rep.
788.

Dupuy vs. Leavenworth, 17 Cal. 262.

Buck vs. Winn, 11 B. Mon. (Ky.) 320.

Davis vs. Davis 60 Miss. 615.

Hogle vs. Low, 12 Nev. 286.

Lauffer vs. Cavett, 87 Pa. St. 479.

McCoy vs. McCoy 202 Pa. St. 497.

In the case of Robinson Bank vs. Miller, which is cited in support of the text both of Cyc. and of Am. & Eng. Cyc. of Law, the court said; at page 1082:

“But, even if the interest held by John S. Emmons was firm property, there is nothing to show that the holders of the mortgage thereon had notice, or reasonable ground for believing that it was firm property. The record title was in John S. Emmons, and all the circumstances coming to their knowledge, as heretofore stated, were calculated to create the impression that his real interest was that indicated by the record. Facts showing a partnership in the milling and grain business were not necessarily notice of a partnership in the land. *Now, it is well settled that a bona fide purchaser or mortgagee of firm property, from one of the purchasers holding the legal title, without notice of its partnership character, will hold it free from partnership claims.* T. T. Pars. Partn. (4 ed.) Sections 277, 278; 1 Bates Partn. Sec. 291; Dyer vs. Clark, 5 Mete. (Mass.) 562; Colly Partn. (Perk. ed) Section 135.”

“A *bona fide* purchaser for value of the real property of a partnership, the legal title to which is vested in the co-partners, or in some one of them for the firm, without notice of the equitable rights of others in it as a part of the co-partnership funds, will, on the ground of his own equities as such purchaser, be protected in his title *in equity as well as at law.*”

Tillinghast v. Champlin, 4 R. I. 173, 67 Am Dec. 510.

“A *bona fide* purchaser, for a valuable consideration, without notice of the partnership character of the property, will take the title in such cases, freed from the *equitable* claims of others, upon grounds of the highest policy.”

Dupuy v. Leavenworth, 17 Cal. 262, at 268.

There is no suggestion in the record that C. A. Smith was not a *bona fide* purchaser for a valuable consideration or that he did not pay full value to the Dean Lumber Company. Nor is there any suggestion in the record that the Dean Lumber Co. did not account to its alleged partners, Bernitt and Wittick for their share of the purchase price received from Smith. But even if their alleged co-partner, Dean Lumber Co., had acted in bad faith and in fraud of their rights, their remedy would be against their alleged co-partners and not against Smith or his successors.

“A purchase of partnership property from a member of a firm in good faith, will be protected, though such partner acted in bad faith, and will not make other partners a tenant in common with the purchaser. The remedy of the defrauded partner is by action against his co-partner.”

Crites vs. Muller, (Cal.) 4 Pac. 567.

Bernitt knew the Dean Lumber Co. had bought out E. B. Dean & Co. (T. pp. 165, 166). C. F. Dillman, the president of the Dean Lumber Co. was introduced to Bernitt by Mr. Merchant as “the new boss of

the Dean Co.” (T. p. 464). C. H. Merchant, one of the original partners in E. B. Dean & Co., and the alleged co-partner of the plaintiff) showed Mr. Dillman over the property, which he was holding as receiver, including the boom and told him it was part of the property that *had belonged* to E. B. Dean & Co. and gave Dillman to understand he had title to it as receiver. (T. p. 465). Bernitt & Wittick permitted the sale to Dean Lumber Co., knew of it, did not object, did not make any claims of ownership, must be presumed to have had knowledge of the receivership proceedings and of their alleged co-partner’s (C. H. Merchant) dealings as receiver.

The first Dillman ever heard of any claim by plaintiff was after the property was sold to Mr. Smith; absolute ownership was claimed by the Dean Lumber Co. and no one else asserted any title to it so far as he knew. The books of Dean Lumber Co. did not show that Bernitt & Wittick had any claim or ownership of the property and nothing was ever done by the directors to give them any interest. (T. p. 465.)

Nor, to the best of his knowledge, was any outstanding claim called to the attention of any officer or discussed by them. *Nothing was of record* to show any outstanding claim and nothing was ever called to his attention that caused him for a moment to question the Dean Lumber Co.’s title. (T. p. 466), and he was president of that company from 1903 to 1907 (T. p. 464).

Under these undisputed facts the sale to the Dean Lumber Co. passed all the title of all the alleged partners. Bernitt and Wittick by their conduct ratified such sale. There is absolutely nothing in the record to support the finding of the court below that C. A. Smith and Smith-Powers Logging Co. succeeded to only the *interest* of E. B. Dean & Co., in the boom and tide lands (T. p. 88.) The record is clear that the *whole title* to the property was conveyed. That the *interest* of E. B. Dean & Co. only was transferred is nowhere even suggested in the record. 'Therefore it was manifest error to decree that the plaintiffs recover the sum of One Thousand Dollars from defendants as the value of plaintiffs' *interest* (T. p. 90). If the plaintiffs were entitled to a share of the proceeds of the sale made by their co-partner C. H. Merchant, to the Dean Lumber Co. and did not get it, they should have looked to him for it. If they were entitled to any of the proceeds of the sale by their alleged co-partner Dean Lumber Co., to C. A. Smith, and did not get it, they should have looked to Dean Lumber Co. for it. There is, by the way, no testimony that they did not receive their alleged share. But, in any event, there can be no question as to *what* was transferred. The whole title was conveyed and not merely the *interest* of E. B. Dean & Co. Furthermore by their conduct, which amounts to gross laches to say the least, they are and should be estopped from claiming in any court of equity that C. A. Smith should pay twice for the same property.

POINT IV.

THE FINDING OF THE COURT BELOW THAT THE DEAN LUMBER COMPANY AND THESE DEFENDANTS RECOGNIZED PLAINTIFFS' ALLEGED RIGHTS AND ACTED UNDER THEIR ALLEGED AGREEMENT IS NOT SUSTAINED BY THE EVIDENCE.

In the decree of the court below, it is said at page 89 of the record:

“that all the persons and corporations succeeding to and owning said interest of said E. B. Dean & Co., in said booms, including the defendants C. A. Smith, C. A. Smith Lumber & Manufacturing Company, and Smith Powers Logging Company, have recognized and acted under said agreement, and have dealt with the plaintiff E. W. Bernitt and his co-party thereto according to and under the terms thereof; that the defendants, C. A. Smith Lumber & Manufacturing Company and Smith Powers Logging Company, since acquiring said interest of said E. B. Dean & Co., in said booms and the ownership of said tidelands, have expressly recognized the rights and privileges of plaintiffs by consenting to the use and operation of said booms by plaintiff during the logging season of 1907 and 1908 under the arrangements that had previously obtained and conformably to said original agreement, and permitted the use and operation thereof by plaintiffs during the rafting

season of 1908 and 1909, but refused to recognize their right to the compensation under said original agreement, and in June, 1909, ousted the plaintiffs from the use and occupation of said booms and further participation in the operation and profits thereof." (T. pp. 89 and 90.)

With all due respect to the court below we unqualifiedly assert that no court can justly make such a finding under the evidence in this case. We will endeavor to sift out this evidence from the mass of which the record is made up. Now the first person or corporation "succeeding to and owning said interest of said E. B. Dean & Co. in said booms" was the Dean Lumber Company, a California corporation. Did that corporation recognize plaintiffs' claims of ownership or rights under the original partnership agreement? Going through the record page by page we find the first witness to mention the Dean Lumber Company is the plaintiff Bernitt at page 165, where he identifies Plaintiffs' Exhibit No. 11 which exhibit and his testimony concerning it prove nothing to the point under consideration. On page 166 he testifies that he told Mr. Squires that if he had the old books of E. B. Dean & Co., he could *prove their claims to the booms*. Who was Mr. Squires? By reference to page 275 of the record we find that Mr. Squires was bookkeeper for the Dean Lumber Company from 1903 to 1905, when he became manager of that company, and that he was manager until January, 1907, at which time the business was turn-

ed over to C. A. Smith. From Bernitt's testimony (p. 166) it appears that the conversation with Squires took place after Plaintiffs' Exhibit No. 11, page 165, was rendered, and that exhibit is dated January 14, 1906. At that time, therefore, Squires was manager of the Dean Lumber Company, and the Dean Lumber Company had had possession for three years, they having taken title through receivership proceedings in 1903 (T. p. 466). And if the Dean Lumber Company recognized plaintiffs' rights and their alleged partnership agreement, why was it necessary, three years after the Dean Co. had been in possession, for the plaintiffs to "prove their claim to the booms?" *Is not this proof, out of the mouth of the plaintiff himself, that the Dean Lumber Company did not recognize their claims?*

On the same page (166) Bernitt testifies that Mr. Merchant introduced him to Mr. Dillman in the following words: "Let me introduce you to your partner, Mr. Bernitt." Note the almost childish effort to prove partnership by the use of the word "partner." Who was Mr. Merchant, and who was Mr. Dillman? Mr. Merchant was C. H. Merchant, Bernitt's own partner according to his version, the member of the old firm of E. B. Dean & Co., the receiver of that firm, who, as such receiver, conveyed to the Dean Lumber Company in 1903. And Mr. Dillman was president of the Dean Lumber Company from 1903 to 1907 when that company conveyed to C. A. Smith. Mr. Merchant and Mr. Dillman are

thus identified, and Mr. Dillman testifies regarding this introduction at page 464 of the record. Mr. Dillman's wording of the introduction is slightly different. He says Mr. Merchant introduced them in the following words: "This is the new boss of the Dean Co." But what is more important is that C. H. Merchant had charge of the properties as receiver of E. B. Dean & Co. at the time it was taken over by the Dean Lumber Company; that he then showed Dillman over the property he was holding as receiver, including the boom, that he told Dillman it was part of the property that had belonged to E. B. Dean & Co. and gave witness to understanding that he had title to it as receiver; that to the best of Dillman's recollection Merchant told him that the property was leased to Bernitt & Wittick for five years; that they were to keep it in repair for five years at their expense *and explained that they were to pay a certain rental* according to the amount of logs they sent through, but he had forgotten the rate. (Tr. p. 464, 465).

Apparently then, even Bernitt's old partner, C. H. Merchant, did not recognize any such claims as are now asserted by plaintiffs. This is all the testimony Bernitt gave concerning this matter.

The other plaintiff, Wittick, did not give any testimony on this point, except that he said that when he and Klockars bought out Emmett Anderson—

"they did not make any deal or agreement with the Dean Lumber Company nor ask them about

it, and never did have any written agreement with them.” (Tr. p. 174).

Of course, his testimony shows that when he was there the Dean Lumber Company paid the same rates for boomage and rafting as had theretofore paid, but our point is that this clearly does not show or ever tend to show that the Dean Lumber Company recognized them as having any ownership of the property, either the tidelands or the boom constructed thereon, or recognized them as “partners” in any respect. On the contrary it tends to prove only that they were allowed to use the boom for half of the boomage charges, and did the rafting with their own rafting gear, in which rafting gear the Dean Lumber Company had no interest whatsoever.

The next witness was John Anderson Emmett and there is nothing in his testimony to show that the Dean Lumber Company ever recognized such rights as were claimed by the plaintiffs. He says:

“That he never had any deed or writing from Merchant, and didn’t see Merchant or the Dean Lumber Company or any one else when he sold to Wittick. (T. p. 181).

The next witness was C. J. Hillstrom and he says that at the time he bought from Robert Kruger, the attorney who was handling the deal for them asked Kruger if he had explained to witness

“That the Dean Lumber Company would not give any deed to this interest in the boom, and

that Kruger answered, 'Yes, I explained that' ".
(T. p. 183).

It is not clear proof that the Dean Lumber Company would not recognize plaintiff's claims? The witness further testified that when he sold to Anderson Emmett, he didn't explain to him that Dean and Company would not give a deed or paper of any kind to the property, because Emmett was the man witness was working for and knew more about it than the witness did (T. p 184).

Hillstrom sold to Emmett and Emmett sold to the present plaintiff, Wittick. Is not the plaintiff estopped by the acts of his predecessors in interest from asserting his present claims against C. A. Smith, a bona fide purchaser from the Dean Lumber Company? From the testimony of the next two witnesses, Haglund and Mattson, it appears that their connection with the business was terminated before the Dean Lumber Company took title and there is nothing in their testimony to show that the Dean Lumber Company ever recognized plaintiffs' alleged rights, nor is there anything in the testimony of the next witness, L. J. Simpson on this subject. The other witnesses for the plaintiffs were Wm. T. Merchant, son of C. H. Merchant of E. B. Dean and Company, and at one time the manager of the Dean Lumber Company, John C. Merchant, another son of C. H. Merchant, George Wulff, L. J. Simpson, J. J. Sullivan, Clarence Gould, George Noy, C. H. Worrell, John Hill and C. A. Johnson, and there is

not a word in the testimony of any of these witnesses upon the point under discussion here. We have carefully examined the testimony of all the witness produced on behalf of the plaintiffs and most emphatically assert that there is not a word of testimony tending to show that the Dean Lumber Company ever recognized the rights claimed by the plaintiffs as found in the decree of the court below. On the contrary the testimony of the plaintiffs themselves and the witnesses called in their behalf was, beyond question, that the Dean Lumber Company not only did not recognize these rights, but expressly and to the knowledge of plaintiffs and their predecessors, refused to recognize any such right.

But to clinch the matter, let us see what the defendants' witnesses had to say. Plaintiffs' witness, Wm. T. Merchant, was recalled as a witness for the defendants and testified that he had been manager for the Dean Lumber Company for four years and had charge of its entire business on the Bay, including the charge and control of the booms in question and,

"That during that time he did not recognize or deal with any one else as having any ownership or interest in these booms." That there was no question but that he would have known of it if the Dean Lumber Company had so dealt, and he did not know of its doing so; that he never understood that there was any understanding *as partners* between Bernitt and the Dean Lumber Company." (T. p. 300).

C. F. Dillman testified that he was president of the Dean Lumber Co. from 1903 to 1907; that the Dean Lumber Company took title in the receivership proceedings from C. H. Merchant, as receiver of E. B. Dean and Company, about March 1903; that the Dean Lumber Company conveyed title to the booms and tide lands in 1907; that he was introduced to Bernitt by C. H. Merchant; that nothing was said to indicate that he was a partner with Bernitt or any one else in the boom or that Bernitt claimed any interest in it; that nothing was said about the ownership of the boom, that raised any question in his mind as to the ownership thereof by the Dean Lumber Company; that C. H. Merchant showed him over the property that he was holding as receiver, and told him that it was part of the property that had belonged to E. B. Dean and Company, and gave witness to understand that he had title to it as receiver; that the property was leased to Bernitt and Wittick for five years; that they were to pay a certain rental, according to the amount of logs that they sent through; that the first he heard of any claim by the plaintiffs was after the property was sold to Mr. Smith; that absolute ownership was claimed by the Dean Lumber Company and no one else had title to it as far as the witness knew. (T. pp. 464, 465, 466.)

W. F. Squire testified that from 1903 to 1905, he was bookkeeper of Dean Lumber Company and was manager of that company from 1905 until the busi-

ness was turned over to C. A. Smith in 1907. (T. p. 275). That after he became manager, he endeavored to find out what arrangement the boom was being operated under, look up records, files and papers of the company; inquired of *Captain Bernitt* and got what information he could from other people who had been connected with the concern. (T. p. 276.)

“That as near as witness could remember from conversations and books, the arrangement with the plaintiffs seemed to be that they had charge of the booms, collected the logs and looked after the logs, which after were caught, they attended to the repairing and had the exclusive privilege of doing the rafting from the boom; that they made their own collections and shared half the profits derived from the boomage, which was credited to them whenever the logs came to the Dean Lumber Company or which they collected themselves when the logs went to other companies. The rafting was always credited direct to them and half of the boomage was credited direct to Bernitt and Wittick under a separate account.” (T. p. 277).

“*That they (plaintiffs) never claimed to the witness that they owned a half interest in the boom.*” (T. p. 279).

P. L. Phelan testified that he was formerly manager for E. B. Dean and Company; that at one time there was some talk of selling the property and that

he went to Mr. C. H. Merchant and asked him about the rights of the rafters in case the boom was sold and C. H. Merchant replied that,

“The rafter never had anything but a working interest and the Dean Lumber Company have always owned the property, and when the property is sold, if the rafters want to raft, they will have to make arrangements with the other party, their interests cease when the property is sold.” (T. p. 269, 270).

“That witnesses’ understanding from Mr. Merchant was that if he could not get along with the rafters he was at liberty to get somebody else to handle the booms; that witness could not find out from books kept prior to this time he went there, what the arrangement was and this was the reason why he talked with Mr. Merchant.” (T. p. 273.)

“That the books showed that E. B. Dean and Company owned the land and paid the taxes and these taxes were not charged to the boom, and didn’t appear anywhere in the Coos River Boom account.” (T. p. 274.)

Robert Kruger, who purchased from Mattson and sold to Hillstrom testified that:

“Matson didn’t claim he was selling any interest in any partnership with Merchant, or the Dean Lumber Company.” (T. p. 289.)

This is positively all the evidence in the record to support the finding of the court below that the Dean

Lumber Company ever recognized the plaintiffs as partners or as having any interest in the property. We have gone carefully through the record and this testimony shows beyond any question that the Dean Lumber Company absolutely refused to recognize the claim which plaintiffs now make.

C. A. Smith was the next person "succeeding to and owning" the property in question, and he in turn, conveyed to Smith-Powers Logging Company. Let us next examine the record to see whether either of these parties ever recognized plaintiffs' alleged rights as owners and partners. Taking up the testimony in the order in which it appears in the record, we find that plaintiffs' witnesses, Wm. T. Merchant, John C. Merchant and George Wulff did not testify on this point. The plaintiff Bernitt testified that he had a conversation with Mr. A. H. Powers (T. p. 147). Mr. Powers was vice-president and manager of the Smith-Powers Logging Company, but was not interested as a stockholder or otherwise in the C. A. Smith Lumber and Manufacturing Company. (T. p. 342). Bernitt's counsel asked Bernitt the following question:

"Q. Did you tell him of your claim of interest in the boom?"

Instead of giving a direct answer to this question, the witness, Bernitt, evaded it and gave the following answer:

"A. Well, he said it himself, that Mr. Smith wanted him to take that boom and this logging

concern over, I believe, but he said he would not, as long as Wittick and I were interested in it." (T. p. 148.)

Bernitt did not have any other conversation with Mr. Powers on that subject about that time or during the year 1907. (T. p. 148).

The witness further testified that in the latter part of the summer or fall of 1908, Mr. Powers first claimed that the plaintiffs owned nothing in the boom, that at that time he had the witness and Mr. Wittick up at the company office and said that the plaintiff had nothing more to do with the boom; that Mr. Oren was there and asked the plaintiff why, if they owned an interest in the boom, they were paying rent for it. (T. p. 150).

The witness further testified that he met Mr. Mereen in the spring of 1907 on a wharf in Marshfield, at which time Mr. Mereen said that he understood that the witness and a partner in North Bend claimed a half interest in the boom, to which the witness replied that they did, whereupon Mr. Mereen said that that was no way to have it, that they had to own it all or none; that he was sure that that was prior to the rafting season of 1907 and 1908. (T. p. 150.)

C. A. Smith purchased from the Dean Lumber Company in February, 1907, (T. p. 219), and according to the plaintiff Bernitt, himself, in the testimony we have just referred to, that Powers and Mereen expressly refused to recognize the claim of ownership in 1907.

In the name of justice, how can any court find that these defendants or any of them recognized these claims when the plaintiff Bernitt himself expressly and unqualifiedly testified that they refused to do so.

Again, on page 151, Bernitt testified that in the fall of 1908 they had the first conversation with Mr. Powers about the ownership of the boom and at that time Mr. Powers said, "I tell you right here that you haven't anything more to do over there." (T. p. 152).

Can this remark of Mr. Powers' be construed as a recognition of Bernitt's rights as a partner and owner?

Bernitt again testified on page 160, that he had a conversation with Mr. Mereen on the wharf one Sunday morning in the summer of 1907, at which time Mereen told him and at which time witness told Mr. Mereen that they claimed an interest in the boom, and Mr. Mereen said that that was no way to have it, that they had to have the whole of it or none, and the witness was not sure whether or not Mr. Powers was there at that time." (T. p. 160.)

The plaintiff Wittick was the next witness called and he testified that he never had any conversation or dealing with Mr. Powers, or any one representing the Smith-Powers Company, that he did not know Mr. Powers even after he had lived here for a year; that he was in the mill office with Mr. Bernitt at the time Mr. Powers told them they had no interest in

the boom, but he didn't remember how long ago it was. (T. p. 174); that at the time Powers told the witness in the office that *he did not recognize plaintiffs as having any interest in the boom* is the only conversation witness ever had with Mr. Powers and that then he "just listened." (T. p. 176).

He further testified that he had no agreement or understanding with Mr. Powers or the Smith-Powers Logging Company. (T. p. 176).

Here again we have positive testimony by the other plaintiff Wittick that the rights claimed by the plaintiffs were not recognized.

Plaintiffs' witnesses, Emmet, Hillstrom, Haglund and Mattson testified to matters that occurred long before Mr. Smith took title from Dean Lumber Company and there is nothing in their testimony on the subject under discussion.

The next witness was L. J. Simpson, called as a witness for the plaintiffs, but afterwards made the witness of the defendants, and he testified that he had had a conversation with Mr. Bernitt and Mr. Wittick in relation to going in jointly with them and the Smith-Powers Company in the ownership and construction of a boom that Mr. Powers claimed that the Smith-Powers Company owned the boom and that Mr. Bernitt and Mr. Wittick had no interest in the business; that he considered their interest as a working interest to do rafting; that the witness knew of the claim of Bernitt and Wittick and that their claim of ownership was discussed

with Mr. Powers at that time. (T. p. 202-203.)

Plaintiffs then recalled W. T. Merchant. There is nothing in his testimony in point nor in that of the plaintiff Bernitt who was recalled.

Mr. C. A. Smith was then called as a witness for the defendants and he testified that in February, 1907, he purchased the boom in question from the Dean Lumber Company, the bargain being made in Sacramento; that all the knowledge he had of the boom was from having seen it when passing by on a launch, and the statement of Mr. Dillman that the boom had been maintained there for many years and that it was a part of the assets of the Dean Lumber Company. (T. p. 219.)

Mr. Smith further testified that at the time of the purchase, he had no knowledge, notice or information that the plaintiffs or any other than the Dean Lumber Company claimed any right or interest in these booms; that he did not remember when he first heard of the plaintiffs' claim, but first heard of it many months afterward, it may have been a year or more; that to the best of his recollection, he had some information that Bernitt and Wittick paid a rental to the Dean Lumber Company of ten cents; a shilling or fifteen cents per thousand for the use of the boom, and thinks that information came through Mr. Powers in the summer or fall of 1907. (T. p. 221.)

Mr. Smith further testified that from the time he first acquired the boom Mr. Powers had had the

practical management thereof; that from the fall of 1909, outside of his interest in the Smith-Powers Logging Company, he had no interest in the business of the boom; that at the time of purchase, he had the records and abstracts of title examined by an attorney to determine the title to all the property, and did not discover that there was any record claim against, or defect in the title to the booms. (T. p. 222.)

The next witness, Mr. Gould, did not mention this subject, nor did plaintiff Bernitt, who was next called.

The next witness was W. J. Ingram, who took charge of the boom between Christmas and New Years 1908. (T p. 233). He testified that plaintiffs, during the winter of 1908 and 1909 were rafting and towing logs and stayed at the boom part of the time; that they were not always there, but Ingram stayed there all the time, camped there at night in a little scow, and lived in while plaintiffs did not live there. (T. p. 243). From this testimony it may be gathered that the plaintiffs' rights were not recognized during the season of 1908 and 1909, as they were busy rafting and Ingram was in charge for the Smith-Powers Company. It is hardly necessary to point out that the question of plaintiffs' rights to conduct a towing and rafting business on the waters of Coos Bay is not in controversy in this suit. Certainly the fact that Mr. Ingram was in charge of the boom for the Smith-Powers Company does not indi-

cate that the plaintiffs' alleged rights of ownership were being recognized at that time.

The next witness, Alvin Smith, did not given any testimony on the question under discussion.

The next witness was Willis Varney, who testified that he was familiar with the booms in controversy, that he first saw them in 1907 when he went over them with Mr. Powers with the view of repairing them; that in 1908, he took charge of boom for the Smith-Powers Company, he thought in the month of August; that no one else was in charge of them at the time and he didn't see either of the plaintiffs at the boom or doing anything there; that he saw them going by, but that was all; that he remained in charge of the boom continuously from August until Christmas and then turned them over to Wm. Ingram. (T. p. 260.)

Here again we find that the Smith-Powers Logging Company were clearly not recognizing plaintiffs' alleged rights.

The next witness was P. L. Phelan, whose testimony covered a period prior to Mr. Smith's acquiring title.

The next witness was W. F. Squire, whose testimony covered the period of occupancy of Dean Lumber Company, and he gave no testimony as to what happened after Mr. Smith took possession, nor is there anything in the testimony of the next two witnesses, C. W. Davis and Robert Kruger.

G. A. Brown testified that he was cashier of the

Smith-Powers Logging Company and had held that position since October 1907, that in the fall of 1907 he heard Mr. Powers say he would have to send a man over to the Coos River boom and see that it was in shape to take care of the logs; that Mr. Bernitt came over and asked for a statement of the rafting, said that Mr. Wittick and himself together received thirty-five cents a thousand for everything rafted out of there and out of the Simpson logs they were to get twelve and one-half cents and the company were to get twelve and one-half cents, and for the logs going to the Smith Lumber Company, twenty-five cents was to go to maintaining the booms and if there was any balance it was to be split; that witness asked him the reason for this and Mr. Bernitt had said they had a *working interest* with the old company to that effect. (T. p. 295.)

In passing we wish to call attention to the fact that the plaintiffs nowhere attempted to contradict this testimony.

The witness further testified that the first settlement with the Smith-Powers Company was made on Mr. Bernitt's statement.

"That Mr. Bernitt didn't claim that plaintiffs were partners with the company in owning the boom or that they owned any title in the boom or the boom property itself." (T. p. 296.)

But he understood from Bernitt that the twelve and one-half cents came from the Simpson Lumber Company to the Smith Company because the latter

owned the boom and that the plaintiffs were to get the said twelve and one-half cents for looking after the boom; that that was their share of their working interest. (T. p. 296); that it was not until 1909 that witness heard that plaintiffs claimed to own any interest in the boom and this claim was made long after the time he had claimed that they had a working interest. (T. p. 296).

There is nothing to the point in the testimony of the next witness, Coddington, or W. T. Merchant, (recalled).

G. A. Brown was next recalled as a witness and testified that it was his understanding from the conversation he had with Mr. Bernitt that the latter represented that he had only a working interest in the boom; that this was at the time he made the first settlement but could not state positively the year. (T. p. 324.)

Again at page 331 of the record the same witness testified,

“That in the conversation with Mr. Bernitt he did not claim to be a partner with the Smith-Powers Company or to be a partner with the Dean Company only as far as a working interest was concerned; that the witness did not try to ascertain at that time exactly what the claim in regard to it was, but understood him to claim a working interest only, and was based upon the conversation with Mr. Bernitt; that Mr. Bernitt’s statements were such that the witness re-

ceived a very fixed impression; that all the interest that the plaintiffs have in that boom was the working interest." (T. p. 332).

Arno Mereen was next called as a witness and he testified that he resided in Berkeley, California, and was the general superintendent of the C. A. Smith Companies; that he did not remember of meeting Mr. Wittick, and the only conversation he had was on the dock in front of the old Dean and Company's store, one Sunday morning, and was the year they were building the new mill, 1907, *some time during the summer*; that as he remembered it, he and Mr. Powers had been talking in connection with some claim that Mr. Bernitt was making relative to ownership or partnership in the booms with the Dean Lumber Company, and that he still held such interest; that Mr. Powers called his attention to it and witness was called into the conversation and told Mr. Bernitt:

"That they did not know him in the deal; that the company could not recognize him in any such deal; that the company knew of no such claim in taking over the property and were not made aware that there was any such deal." (T. p. 334.)

Here, again, is positive, direct testimony that the defendants, C. A. Smith and Smith-Powers Logging Company *did not recognize* plaintiffs' claim and that they so informed plaintiffs in 1907, and this testimony is not only uncontradicted but is corroborated

by plaintiff Bernitt himself at page 150 of the record.

There is nothing in point of the testimony of the next witness, McLaren.

A. H. Powers was the next witness called and he testified that he was vice-president and general manager of the Smith-Powers Company and had been such since the organization of the company in 1907; that he first saw the property involved in this suit in February 1907; that at that time he went over the boom, as Mr. Smith had told him that he had purchased it from the Dean Company, that he met the plaintiff Bernitt in the summer of 1908 but did not meet Wittick until the fall of 1908; that in July 1907 the Smith-Powers Logging Company purchased the boom and the tide lands. (T. p. 342-343.)

Mr. Powers further testified that shortly after he bought the boom, he talked with Mr. Squire, who introduced him to Mr. Bernitt and told him about the rafting, and what he had paid Mr. Bernitt for doing the rafting and the witness looked over the boom with Mr. Bernitt and made arrangements for him to do the rafting that season just as he had always done the rafting; that he was willing for him to handle the same as he had always handled it for that season. (T. p. 345.)

Can this testimony be the basis for the decree of the court below that defendants consented to the use and operation of the boom by plaintiffs during the logging season of 1907 and 1908 under the arrange-

ment that had previously obtained and conformably to said original agreement? Is that a fair construction of the testimony of Mr. Powers, when it is apparent that he made this arrangement upon the strength of what Mr. Squire had told him in regard to the amount previously paid for rafting? Powers knew nothing of the alleged partnership agreement and knew nothing of plaintiffs' claims of ownership. The only fair construction of this testimony is that he intended to pay Bernitt the same amount for rafting that had previously been paid him and did not intend to act "conformably with the original agreement," of which agreement he had no knowledge.

Mr. Powers testified further concerning this matter at page 354 of the record, as follows:

"Mr. Squire introduced me to Mr. Bernitt, the first time I remembered of seeing him, sometime in July 1907 and Mr. Bernitt and I went and Mr. Squire went over the boom and went around over it. Mr. Squire had told me that Mr. Bernitt always had done the rafting for the Dean Company since he had been there and he considered him a good raftsman, and he wanted to know if I would make a deal with him for doing the rafting this coming year. So we went over and looked over the booms and I told Mr. Bernitt that I would be glad for him to go ahead and handle the boom that year just as he had been handling it the year before; that we didn't

have very many logs in the river of our own and that I wasn't prepared to do the rafting at that time."

Mr. Powers further testified regarding the conversation which took place at the time Mr. Bernitt was introduced to Mr. Mereen, when Mereen told Bernitt that they didn't recognize Mr. Bernitt or any one else as having an interest in that boom, as he understood C. A. Smith bought the entire affair from the Dean Company. (T. p. 359).

Mr. Powers further testified as follows:

"Then the next time I met Mr. Bernitt about it was the first time that I ever remember seeing Mr. Wittick. Mr. Bernitt, Mr. Wittick, Mr. Goss, Mr. Oren and myself, that fall—I think sometime late in October, had a meeting over in the Company's office and we talked over this boom business and I told Mr. Bernitt at that time, the same as I had told him before, that I had bought the entire interests; that I, as the Smith-Powers Logging Company, had bought the entire interest in that boom from C. A. Smith and I couldn't think of having any partners in the business; that I was prepared to do the rafting myself and was rigging up for it;

* * * * *

I also told him that if at any time I wanted anybody to work, to hire anybody by the days' wages or anything like that, I would be glad to give them a job the same as anyone else, when-

ever I needed a man. That was in the presence of the gentlemen that I have just named over.” (T. p. 359).

Mr. Powers further testified that he did not remember of ever having any conversation with Mr. Wittick with regard to the boom work except at that time.

Mr. Powers further testified at page 368, concerning the conversation on the wharf one Sunday morning in 1907, concerning which both Mr. Bernitt and Mr. Mereen testified, and says that Mr. Mereen told Bernitt that they did not recognize anybody in that boom, that it was bought from the Dean Company, by Mr. Smith as the other property was at Marshfield and that it was sold to the Smith-Powers Logging Company.

There is much similar testimony by Mr. Powers on pages 369 and 370, all of which is conclusive that Mr. Powers never recognized in any way the plaintiffs' claim of as partners or owners.

The next witness was Mr. George Nay, who testified entirely concerning other matters, as did C. H. Worrell, John Hill, C. J. Hillstrom, Henry Coffin and W. J. Ingram. Mr. Powers and Mr. Simpson were also recalled and so were the plaintiffs N. W. Bernitt and Victor Wittick, but none of them testified concerning the matter under consideration.

Mr. Powers was again recalled and testified as follows:

“I never had any talk with Mr. Bernitt about

them going in with me on the booms. The only talk I had with them was in regard to them doing the rafting the first year we was here, the winter of 1907 and the spring of 1908, and that was that they could go on and do the rafting the same as they had done it theretofore that year, but so far as having any talk with them in regard to them going in with me on the boom, I never had any such conversation. The conversation in regard to anybody going in with us on the boom was all done with L. J. Simpson and Captain A. M. Simpson, and the first that I had heard that Mr. Bernitt or Mr. Wittick claimed any interest in the boom, I heard it from Mr. Varney and our other men that were working on the boom, dividing the channel. This was the first intimation that I had ever had that they claimed any interest in the boom." (T. p. 457.)

The next witness was J. E. Oren, who testified that he was a resident of Bay Point, California; that he was vice president and manager of the C. A. Smith Lumber and Manufacturing Company from the time the company was organized until about the middle of September, 1909; that as such officer, he examined the booms in question in March, 1907, and saw them frequently during the time he was in Marshfield; that he then took possession of the booms and did not see either of the plaintiffs in or around the boom nor any man present upon or in possession of the boom; that the record title then

stood in the name of C. A. Smith Lumber and Manufacturing Company, but the Smith-Powers Logging Company was the actual owner and had charge of the management and operation of the booms. (T. p. 462.)

That to the best of his recollection, in the spring of 1909, a meeting was held in the office of the Smith-Powers Logging Company at which time there were present Mr. Powers, Mr. Bernitt, Judge Goss and Mr. Wittick, at which time, Mr. Bernitt and Mr. Wittick requested to be recognized as part owners of the boom, which request Mr. Powers refused; that the witness never had any conversation with either of the plaintiffs as to any right or pretended rights on their part in these booms. (T. p. 463.)

Mr. Dillman's testimony has already been discussed, and his testimony is the next appearing in the record.

We have now discussed fully and fairly the testimony of every witness who testified on the subject under discussion and there is absolutely nothing on which the court below could base its finding that the Dean Lumber Company or any of these defendants ever recognized plaintiffs' alleged rights of ownership and partnership or ever acted "conformably with said original agreement," and we ask this court to examine this record in fairness and justice to these appellants and say if any such finding is justified.

POINT V.

THERE IS NOTHING IN THE RECORD JUSTIFYING THE FIXING OF JUNE 1909 IN THE DECREE AS THE DATE WHEN PLAINTIFFS WERE OUSTED OF POSSESSION.

The court says that in June 1909 defendants ousted plaintiffs from the use and occupation of said booms. (T. p. 90)., and awards damages up to that time.

This finding is clearly contrary to the evidence of the plaintiffs themselves as well as the evidence of the defendants. In witness, Bernitt testified as follows:

Q. Now, how long did you continue to operate these booms up to, from the time you have indicated in your testimony since making the arrangement with Mr. Merchant, or E. B. Dean and Company?

A. Up to when?

Q. Yes.

A. *Up to 1908—up to the spring of 1908*" (T. p. 144-145).

"That the plaintiffs had charge of the boom in the year 1907 and 1908, and in the fall of 1908 they had the first conversation with Mr. Powers about the ownership of the boom; that the Smith-Powers Company caught the first logs that came down that fall; that whenever logs were turned loose above tide water, they were sent word to be over and catch them, but this

time they were not notified and the witness asked them what they meant by cutting plaintiffs out that way. Whereup Mr. Powers told the witness to bring Mr. Wittick up to the office and talk it over; that at the office the witness explained that they had built the booms and paid for them and claimed a half interest in them, and that Mr. Powers finally said, "I tell you right here that you haven't anything more to do over there," and said that they had no interest in the booms." (T. p. 151-152).

Here is positive testimony by the plaintiff Bernitt that he was ousted of possession in the fall of 1908, yet the court below fixes the date as June 1909.

We are at a loss to understand where the court below found in the testimony any reference to June 1909 unless it be at page 222, where C. A. Smith testified that since June 1909, outside of his interest in the Smith-Powers Logging Company, he had no personal interest in or possession of the boom, etc., and the further testimony at page 223, that the paper title may have passed about 1909, and he also says on the same page that the Smith-Powers Logging Company was in control of the property as owner long prior to that time.

W. J. Ingram testified that he was in charge of the boom in the winter of 1908 and 1909 and took charge of the boom between Christmas and New Years' 1908, and remained in charge until March 5, 1909. (T. p. 233).

Willis Varney testified that in August 1908 he took charge of the boom for the Smith-Powers Logging Company and that no one else was in charge of them at the time and he didn't see either of the plaintiffs at the boom or doing anything there, that he saw them going by but that was all; that he remained in charge of the boom continuously from August until Christmas and then turned them over to Wm. Ingram. (T. p. 260).

He also testified to the same effect as did Bernitt that in the fall of 1908, when the logs first came down, they were caught by the Smith-Powers Logging Company. (T. p. 266).

Bernitt also testified at page 146 of the record that the plaintiffs had possession of the boom *up to the spring of 1908*.

Mr. Powers testified that Mr. Varney was placed in charge of the booms in July 1908 and was instructed to build the booms and did build the booms under Powers' instructions. (T. p. 381.)

The record is clear and the evidence is uncontradicted that the Smith-Powers Company took exclusive possession of the booms in the summer of 1908 and that if the plaintiffs were ever ousted they were ousted then.

The complaint alleges that they were ousted in June, 1909, and the court below in its opinion, page 80, calls attention to this allegation of the complaint and says: "This allegation seems not to be contradicted by the defendants and must be taken as true."

In this connection we call attention to paragraph 9 of the answer (T. p. 54), where it is alleged that in July 1907 C. A. Smith and Smith-Powers Logging Company agreed to purchase the tide lands and boom and at that time *entered into the possession thereof and ever since have been in the open, continued and exclusive control thereof*, and to the allegation of the answer on page 58 of the record, that the plaintiffs were permitted to operate the boom until the fifteenth day of October, 1908, at which time the defendants informed the plaintiffs that thereafter the Smith-Powers Logging Company would take exclusive charge of said boom and premises.

These allegation and other allegations of the answer seem to us to clearly negative the assertion that defendants admitted ousting plaintiffs of possession of the boom in June, 1909, furthermore as we have pointed out, there is no contradiction in the testimony on this point, plaintiffs' witnesses and defendants' witnesses all agreeing that since the summer of 1908 the Smith-Powers Company was in exclusive possession of boom.

The fixing of this date is of the utmost importance for the reason that in the court's decree, the damages awarded and the amounts decreed due plaintiffs were for the logging season, that is the winter of 1908-1909.

If the date of ouster is the limit of the time for which plaintiffs are entitled to recover, then clear-

ly by the same reasoning, if the time be the summer of 1908, then the plaintiffs are not entitled to recover after that time.

POINT VI.

IF, AS FOUND BY THE COURT BELOW, THE DEFENDANTS RECOGNIZED AND ACTED "CONFORMABLY TO SAID ORIGINAL AGREEMENT," THEN THE PLAINTIFFS SHOULD CONTRIBUTE TO THE EXPENSE AND MAINTENANCE OF THE BOOM CONFORMABLY TO THAT AGREEMENT.

In its decree the court below finds (T. pp. 89 and 90) that the defendants "have recognized and acted under said agreement, and have dealt with the plaintiff Bernitt and his co-party thereto according to and under the terms thereof" and "have expressly recognized the rights and privileges of plaintiffs by consenting to the use and operation of said booms by plaintiff during the logging season of 1907 and 1908 under the arrangements that had previously obtained and conformably to said original agreement, and permitted the use and operation thereof by plaintiffs during the rafting and logging season of 1908 and 1909, but refused to recognize their right to the compensation under said original agreement."

Even if we admit, for the purpose of argument, that all this is correct, and even if a court of equity were decreeing specific performance of the contract in question, it seems manifestly unjust and inequit-

able to enforce only that part of the contract which entitles the plaintiffs to compensation and refuse to enforce that part of the contract which requires them to bear their share of the burden.

As we have seen, the Smith-Powers Logging Company, through its manager, A. H. Powers, permitted the plaintiffs to operate the boom during the logging season (winter) of 1907-1908 believing that the old arrangement was that they were to have for their work one-half of the boomage charges and their usual rate for rafting, and in ignorance of their claims of ownership and partnership. There is and can be no question of the good faith of the defendants. Their every transaction was open and above board. They have conducted themselves in such a way throughout as to merit the consideration of a court of equity. The plaintiffs, during the winter season of 1907-1908, had all the privileges and emoluments they had ever had. There is no dispute as to their having collected all that was due them or that they claimed to be due them for this period.

Bernitt testified:

“That during the winter of 1908, i. e., the boom season of 1907 and 1908, *the plaintiffs handled all the logs at the boom and collected the boomage and rafting charges the same as they had done before.*” (T. pp. 160-161.)

Again Bernitt testified:

“That during 1907 and 1908 the plaintiffs handled the boom and the rafting and collected

as usual therefor, and that no one else was in possession except himself and Wittick." (T. p. 149.)

The plaintiffs and the Smith-Powers Logging Company had a settlement for the logging season of 1907 and 1908 and such settlement was handled on the basis of the figures that Mr. Bernitt gave to Mr. Brown, who was cashier of the Smith-Powers Logging Company at that time. T. p. 297.)

In August 1908 Willis Varney took charge of the boom for the Smith-Powers Company and from that time until Christmas 1908, he and his crew of men were engaged in repairing the booms and building additions thereto. (T. p. 260), and he turned the booms over to his successor, Ingram, who took charge of the booms between Christmas and New Years (T. p. 233).

Let us examine the testimony to ascertain the condition of the booms at that time and the necessity for repairs, changes and extension of said booms.

Bernitt says that the amount which each party had to contribute when the boom was behind must have been four or five hundred dollars every year. (T. p. 156); that every year they had to renew chains and set piling and repair and extend the boom and that every year they would have a pile driver there to repair and that there was never a year that they did not take up from 1500 pounds to a ton of chains; that the chains did not last there over five, six or seven years. (T. p. 156).

There was other testimony that the old piling along the shore was pretty well rotted at the top and decayed from water; that they were so rotted down as to impair their usefulness, as, if a pile used in a boom, is rotted below high water it is of no particular use for the boom as the logs go over it; that quite a number of these piles were rotted below high water; that they would just hit them with an axe and the top would fall over; that the chains were pretty well used up and the sticks water-logged, many of them sunken; that the upper boom was not safe to hold logs, etc., etc. (T. p. 234).

That the old booms were worth possibly four or five hundred dollars. (T. p. 236).

Alvin Smith who had lived near the boom for twenty-five years testified to the same condition. (T. p. 253 et seq.)

Willis Varney also testified to the bad condition of the boom. (T. p. 259. et seq.)

P. L Phelan, manager for E. B. Dean and Company, testified that the boom wasn't kept up, was depreciating all the time, getting a little worse, and a little worse and not only were most of the boom sticks rotting out faster than they were replaced and the chains giving out, but the boom itself was filling up rapidly on account of drift and that if something wasn't done, in a few years it would fill up and become a mud flat; that the policy was to make just what repairs they were compelled to to save the logs. (T. p. 271-272.)

Mr. Squire, manager of the Dean Lumber Company, testified that the booms were badly dilapidated and that he talked with Mr. Bernitt in regard to repairing them and that the last year before the company sold out, he had considerable talk with Mr. Bernitt about the boom and they came to the conclusion that they would not expend any more money than was absolutely necessary to keep the booms in sufficient repair to work another season; that while he was manager, the repairs were no more extensive than were necessary to operate the booms and there were no extensions or improvements that he knew of, that he often conferred with Mr. Bernitt about the course to pursue as there was apparently a crisis coming as to whether they could use the booms at all or not, and they were being forced by other parties who were kicking that the booms occupied the channel and there seemed to be no permit from the government; that they didn't suppose that they could obtain a permit from the Government to use the booms that way and that it was a matter of just get along as well as they could until they were compelled to do something different; that this was the talk between the witness and Mr. Bernitt. (T. p. 278.)

Robert Kruger, who was a raftsman, and formerly interested in the boom in question, and one of the alleged "partners," testified that after he sold out he was in the rafting business and rafting out of Coos River right along, and went by the boom and saw it a great deal, that some little repairing was done on

the boom once in a while; that he saw the boom in 1907-1908 when Mr. Powers took charge of it and at that time the boom wasn't in very good condition; that the Smith-Powers Logging Company drove the piles, put in new boom sticks, and made pockets. (T. p. 290-291.)

Charles H. Coddling, testified that he was a civil engineer and had seen the boom and surveyed it when Mr. Powers first took charge; that while the piling was all right; there was some dolphins built that were boarded up and many and many of the boards were gone and the boom sticks were disconnected in places; the chains gone entirely; that a number of chains or toggles were in bad repair, lost and nearly all eaten out; that the boom altogether had what the witness would call an abandoned look and did not look as though it had been used for a long time. (T. p. 298).

A. H. Powers testified that when the Smith-Powers Logging Company took charge of the booms, the condition of the boom was very poor, many of the piling were rotted out; that logs could not be handled economically through such a boom as there were no rafting pockets, and it would cost a great deal more than it should to handle the logs; that many of the boom sticks were rotted, water-logged, absolutely run down and entirely out of repair; that most of the chains were in such poor condition that you could kick them out with your foot; that the sheer booms were in bad condition, had never been properly made, etc. (T. p. 343-344).

There is much similar testimony in the record of similar import which is not contradicted by plaintiffs and it can not be questioned but that the boom was practically useless when Mr. Smith purchased it and when Smith-Powers Logging Company took charge of it.

There is also a mass of testimony as to the repairs that were made by the Smith-Powers Logging Company much of which can be summed up by reference to defendants' Exhibit "C", page 305, which shows that from September 20, 1917 to January 1st, 1909, the Smith-Powers Logging Company spent \$10,736.-80 in and about this boom, this January 1st, 1909 balance appears at page 307. Of this amount, \$7,-155.00 was paid to the Coos River Tide Lands Company for tidelands. (T. p. 326), but passing for the moment the question of the necessity of purchasing these lands, the statement shows that the other items were chains, bolts, labor, spikes, links and staples, rings and toggles and similar articles.

Defendants' Exhibit "D", page 320 of the record also sums up briefly the amount expended in repairing this boom.

Disregarding the question of the necessity of purchasing tide lands for making changes and additions as required by the United States Government, and disregarding the question of the necessity of building additions and extensions to the boom, the testimony clearly shows that the Smith-Powers Logging Company expended large sums in the actual repair

of the old boom; that such repairs were absolutely essential to the operation of the boom. Surely it is not in equity that an innocent purchaser for value should be compelled not only to pay for the property twice, but to shoulder the whole burden of the necessary repairs and maintenance and expense of operating the boom and allow the plaintiffs who, under their own statement of the case, had slept on their rights for years, to reap the profits without sharing in the losses under their alleged co-partnership agreement, which the court below says all parties during that period recognized and acted under.

ILLEGALITY OF THE OLD BOOM AND THE ABSOLUTE NECESSITY OF CHANGING IT IN ACCORDANCE WITH UNITED STATES GOVERNMENT REQUIREMENTS.

Prior to the time defendants took over the boom there had never been any government permit obtained for the construction and maintenance of the boom as required by law.

The Acts of Congress referred to are 6 Am. U. S. Stat. p. 805, River & Harbor Act, Sept. 10, 1890-27 Stat. at L. 88 which prohibits the erection of booms, etc., and the creation of any obstruction not affirmatively authorized by law, to the navigable capacity of any waters in respect to which the United States has jurisdiction, and constitutes as an offense "the continuance of any such obstruction, whether heretofore or hereafter erected except bridges, piers,

docks, and wharves, and similar structures, erected for business purposes", and 26 Stat. at L. 454, Act of March 3, 1899, 30 Stat. at L. 1151, which forbids the erection of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States including "pier, dolphin, boom," etc., except on plans recommended by the Secretary of War.

There can be no prescriptive right to maintain or continue a material obstruction in a navigable stream.

30 Cyc. 310.

Such an obstruction may be removed without compensation from the United States and such removal cannot be regarded as a "taking of private property" within the meaning of the constitution.

21 Op. of Atty. General, 43.

Bernitt testified that they never got a Government permit for any of the booms, that Mr. Merchant told him it wasn't necessary (Tr. p. 158).

The necessity for obtaining the permits, the changes necessary to comply with the terms of the permits, etc., are testified to at pages 345 and 350 of the record. The permits and their requirements are found on pages 488 et seq. and the testimony of the U. S. Government Engineer regarding the necessity of obtaining these permits is found at page 494.

The court below recognized the importance of this

evidence in its opinion (p. 82) and says that the government requirements imposed a large amount of expense for reconstruction, that plaintiffs were unable to meet that expense, and that the booms without reconstruction with an open channel between them would be much less valuable than in their original condition. Having found them much less valuable in such condition, and having found their fair value when the logging company took them over to be \$2000, it would seem to be logical at least to deduct from the \$2000 the amount by which they would be depreciated by complying with the government requirements, and this without regard to the obvious error in excusing plaintiffs from non-performance either of its alleged contract by complying with its alleged contract and contributing to the expense of reconstruction, or from complying with the government requirements, because of their inability to meet the expense. The fact that they are unable to meet their contractual obligation and the requirements of law does not justify their enrichment at the expense of law, logic and litigants.

Much might be said about the admissibility of the old books of E. B. Dean & Co., which books and the entries therein were identified by witnesses who were children ten years old at the time the entries were made; the failure of the evidence adduced by plaintiffs to make out a case cognizable in equity, and other errors, but we believe we have sufficiently established that the decree of the court below should

be reversed and a decree entered in accordance with the prayer of the defendants' answer.

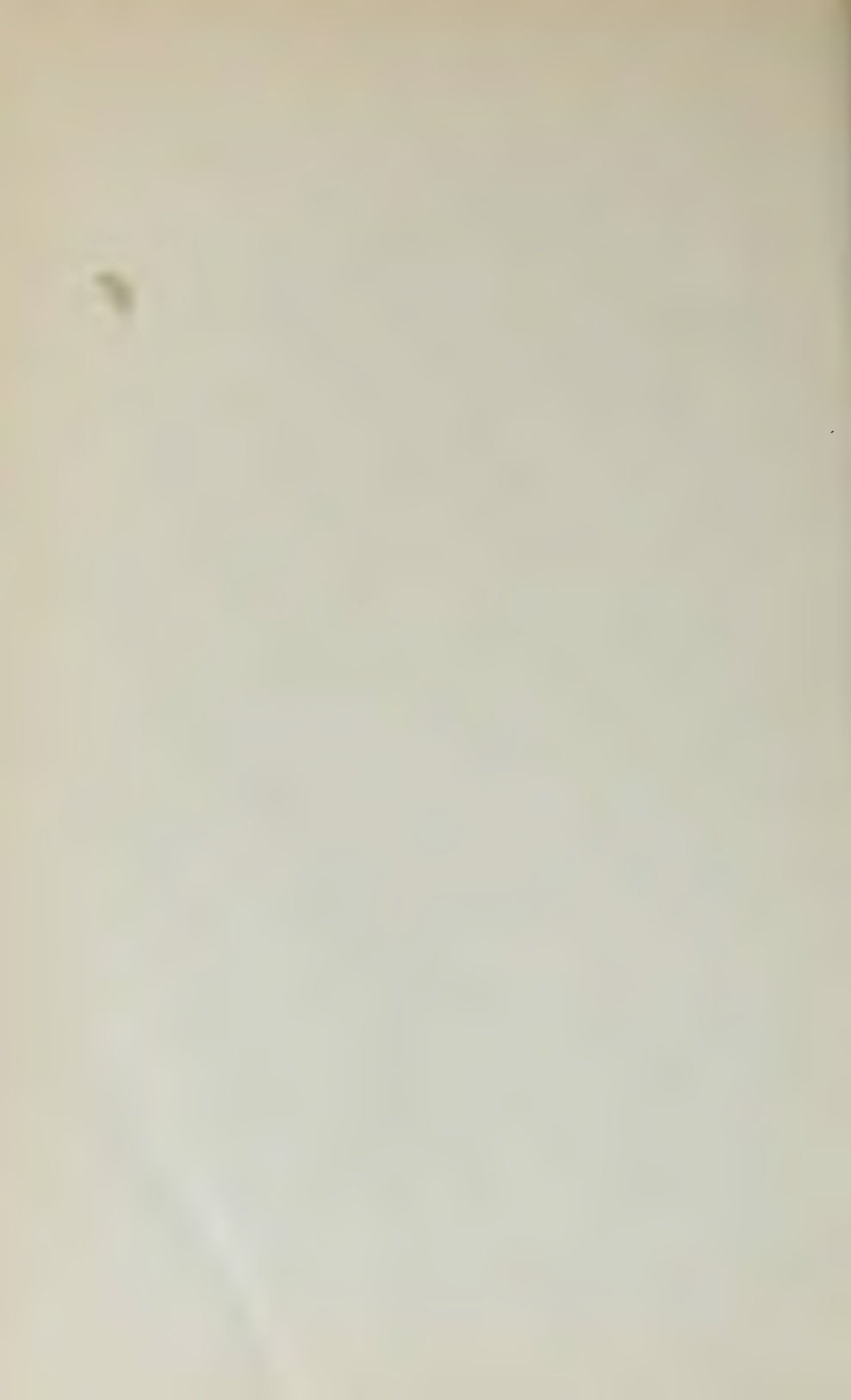
Respectfully submitted,

JOHN D. GOSS,

Attorney for Appellants.

HERBERT S. MURPHY,

Of Counsel.



No. 2591

IN THE

**United States Circuit
Court of Appeals**
FOR THE NINTH CIRCUIT

SMITH-POWERS LOGGING COM-
PANY, A Corporation, and C. A.
SMITH LUMBER & MANUFACTUR-
ING COMPANY,

Appellants.

vs.

E. W. BERNITT and VICTOR WITTICK,
Appellees.

Appeal from the District Court of the
United States; for the District of Oregon

BRIEF OF APPELLEES.

W. U. DOUGLAS,

Marshfield, Oregon.

JOHN F. HALL,

Marshfield, Oregon.

Solicitors for Appellees.

Filed

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F. D. Monahan

IN THE
**United States Circuit
Court of Appeals**

Ninth District

SMITH-POWERS LOGGING COM-
PANY, A Corporation, and C. A.
SMITH LUMBER & MANUFACTUR-
ING COMPANY,
Appellants.

vs.

E. W. BERNITT and VICTOR WITTICK,
Appellees.

Appeal from the District Court of the
United States, for the District of Oregon

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

This is a suit in equity between tenants in common for an accounting and a judgment for such amount as the Court shall find due appellees from appellants or either of them, and also asking for a sale of the common property and such other relief as to the Court shall seem meet and equitable. Appellees claim the facts in this case are:

That in 1881 E. B. Dean, David Wilcox and C. H. Merchant were carrying on and conducting a saw mill business upon Coos Bay, in Oregon, under the firm name of E. B. Dean & Co.; that they desired to make certain arrangements with men carrying on rafting business so that the logs for their saw mills coming down on the waters of the various tributaries of Coos Bay could be properly and economically handled; that George Wulff and David Young were in the business of rafting logs, and William Klahn and E. W. Bernitt were also in the same business; that pursuant to this idea C. H. Merchant, one of the partners, induced George Wulff and David Young to contribute to the construction of certain log booms, in the complaint described, for the catching of these saw logs and timber; that the land for the most part upon which these

booms were constructed belonged to the partnership of E. B. Dean & Co.; that C. H. Merchant also tried to induce William Klahn and E. W. Bernitt to go into the business with them, but at first they hesitated and E. B. Dean and Co. together with George Wulff and David Young commenced the construction of what is described in the testimony as the Upper Boom; that before said Upper Boom was completed, however, William Klahn and E. W. Bernitt consented and did go in and became interested in the enterprise; that E. B. Dean & Co. was to, and did, furnish the land and one-half of the cost of building the booms, and the other parties were to, and did, pay for half of the construction of the booms and were to, and did, operate and take care of them; that E. B. Dean & Co. was to, and did, pay 25 cents per thousand feet board measure, for saw logs and 1-8th of a cent per lineal foot for piles, for its own timber caught and handled through the boom, and the boom was also used to catch the saw logs and timber of other parties at the same price.

That the following method of handling the business was adopted: The logs and timber caught in the boom for Dean & Company were credited to a Boom Account kept by E. B. Dean & Co. on its books, and the cost of keeping up the

boom, such as labor and material for repairing it was charged to this account. Ordinarily at the end of each rafting season a balance would be struck and if the upkeep of the boom had not consumed the entire earnings of the boom for logs caught belonging to E. B. Dean & Co. the difference was divided among these parties, one-half was retained by E. B. Dean & Company and one-half was placed to the credit of the rafters on their individual accounts on the books of E. B. Dean & Co. If the earnings of the boom from the logs and timber caught for E. B. Dean & Co. were not sufficient to pay for the upkeep of the boom, the deficiency was charged, one-half to E. B. Dean & Co. and one-half to the rafters, who at the beginning of the agreement were George Wulff, David Young, William Klahn and E. W. Bernitt; that the earnings of the boom from other logs and timber caught there in for outside parties were divided, E. B. Dean & Co. taking one-half and the rafters taking the other half, divided in proportion to their respective portions. This was the original arrangement, and it continued through the various chains of ownership down to some time in the year 1909.

In the meantime the partnership of E. B. Dean and Co. had been dissolved by

agreement and death, and the Dean Lumber Company succeeded to the interests of the partnership, and thereafter C. A. Smith succeeded to the interests of the Dean Lumber Company, and thereafter the Smith-Powers Logging Company became the successor of C. A. Smith.

On the other hand the rafters George Wulff and David Young retired from the rafting business and their interest in the boom was finally acquired by the appellee Victor Wittick, after many transfers. The rafter William Klahn assigned his interest to the appellee E. W. Bernitt, and the said E. W. Bernitt is the only one of the original parties now remaining.

During all these changes of ownership of the lands, and transfers of the boom privileges between the rafters, the original agreement was recognized, carried out and worked under until some time in June 1909, long after Smith-Powers Logging Co. claim to have acquired its interest in the booms, when it took exclusive possession of them and prevented the appellees from using the same or any portion thereof afterwards. In addition to the first or original boom another boom was built and various improvements were made upon the land during the time of the ownership of E. B. Dean & Co., and in its immediate vicinity, for

facilitating the handling of the boom business. By reason of this appellees had an irrevocable license, easement and right to use the booms, with a joint interest in the improvements upon the lands.

In addition to the right to catch the logs in the boom and charge a certain stipulated price therefor, the rafters had the additional privilege of rafting all the logs so caught, to their destinations from the booms, viz: the different saw mills situated upon Coos Bay, and for this service a charge of 35 cents a thousand (board measure) for logs, and a half cent per lineal foot for piling was imposed by them during all those years. The interest in the boom represented by E. B. Dean & Co. and its successors did not participate in any manner in the charge for the rafting.

In addition to the property rights claimed by the appellees in the boom, they sought to recover boomage for a large number of logs and piles, caught in the booms and rafted during the flood season of 1908 and 1909 beginning with the fall of 1908, claiming that the Smith-Powers Logging Co. and the C. A. Smith Lumber & Manufacturing Co. prevented them from collecting their portion of the amount chargeable therefor. Also that the Smith-Powers Logging Co. has col-

lected and retained a large amount of money for their services in rafting and refused to acknowledge any claim of appellees to it.

The Court held with appellees on the question of ownership in the booms and allowed them therefor \$1000.00, and on the question of boomage for logs caught in the boom and rafted by appellees the sum of \$2667.34, or a total judgment of \$3667.34.

In the Court's opinion, however, it found among other items entering into the amount owing appellees for rafting and boomage that there was due them the sum of \$1544.00 collected by Smith-Powers Logging Co. from the Simpson Lumber Co., and that the Smith-Powers Logging Co. had paid to the Simpson Lumber Co. the sum of \$600.00 for appellees, but in entering its decree only deducted from the \$1544.03 the sum of \$295.30. Therefore, to correct the record appellees filed a remittitur (page 92 transcript) in the sum of \$304.70, and thereby the appellant has had full credit for said \$600.00, so that the decree now stands for \$3362.64.

The pleadings allege and admit the incorporation of the various corporation defendants.

The pleadings also allege and admit

the partnership of E. B. Dean, David Wilcox and C. H. Merchant.

The answer admits the ownership of the land upon which the booms are situated to be as in the complaint stated and now in appellant Smith-Powers Logging Co.

The complaint in substance alleges that the appellees and their predecessors did enter into the possession of the land at the solicitation and request of E. B. Dean & Co. and contributed jointly with them in defraying the cost of the construction of the booms thereon to the extent of one-half. The answer does not deny this, but alleges E. B. Dean & Co. erected the booms, and admits that appellees or their predecessors did assist in the erection of the booms, and did go into the possession of them.

The complaint alleges that under the agreement the appellees' predecessors were to do all the rafting of the logs and timber from the boom, and that they were to attend to the catching of all the logs and timbers therein. The answer denies this agreement yet it admits that they and their predecessors did this work for many years.

There is no controversy in the pleadings as to the amount that was charged for boomage or how it was divided only

in the manner of stating it. It is alleged by the complaint and admitted by the answer that it was 25 cents per thousand feet for logs and 1-8th of one cent per lineal foot for piles, for boomage, and 35 cents per thousand, board measure, for logs, and $\frac{1}{2}$ cent per lineal foot for rafting.

The complaint alleges the various changes of ownership of the land whereby it was acquired by Dean Lumber Co. from E. B. Dean & Co. and then by C. A. Smith and Smith-Powers Logging Co., and this is admitted by the answer.

The appellees have alleged the taking of exclusive possession and control of said booms by the Smith-Powers Logging Co. and that is admitted by the answer.

The pleadings, however, put in issue the question of the terms of the original agreement as alleged in the complaint. To prove this agreement the appellees have introduced the testimony of E. W. Bernitt (see pages 138 and 139 of transcript, and at other places in the testimony of said witness), and of George Wulff (see pages 135 and 138 of transcript), which is in effect that E. B. Dean & Co. through one of the members of the firm, C. H. Merchant, induced George Wulff and David Young to enter into an agreement for the construction of one of the

log booms, the Upper Boom, upon a portion of the land described in the complaint, for the purpose of engaging in the business of booming logs and timber therein. The understanding being that E. B. Dean & Co. was to furnish the land and pay one-half of the cost of the construction of the boom, and said Wulff and Young the other half, and each was to have a half interest therein. That they began the construction of the boom and had it nearly completed, when said C. H. Merchant, with the consent of all the other parties, induced William Klahn and E. W. Bernitt to take a quarter interest between them, this interest being a half of the interest of Wulff and Young. Thereupon the private account of Wulff and Young upon the books of E. B. Dean & Co. was credited with \$750, and the account of Klahn and Bernitt was charged with \$750.00 in payment for the quarter interest.

That afterwards a lower boom was constructed and certain extensions and improvements made, toward the payment of which they all contributed in accordance to their proportionate interest under the original agreement.

In addition to this, the account books of the partnership of E. B. Dean & Co. for the year 1881 and several succeeding

years were introduced and marked Exhibits 1, 2, 3, 4, 5, 6, 7, being identified by the witness W. T. Merchant, John C. Merchant also identifying said exhibits 6 and 7, also exhibits 18, 19, 20, 21, 22 and 23 being identified by W. T. Merchant. Both of these witnesses are sons of the said C. H. Merchant, a partner in the firm of E. B. Dean & Co., and testify that some of the entries made therein are in the handwriting of their father, which they know and recognize.

Exhibits 1 to 7 corroborate this oral testimony concerning the construction of the first or Upper Boom and the interests claimed by appellees. Exhibit 1 is the ledger of E. B. Dean & Co. from January 1879 to December 21st 1881. Upon page 272 thereof is the Coos River Boom account and it shows that against this account there were charges in the total sum of \$2364.65. The first item is \$30.70 and at page 197 of Exhibit No. 2 one item is "Sundries, \$24.70," the other "Spikes, \$6.00," making a total of \$30.70. By referring to Exhibit No. 3 at page 310 we find that this item of sundries consisted of 3100 feet of three-inch planking, \$21.70, and 1000 feet of refuse, \$3.00, making the total of \$24.70. The next item charged in that account upon said ledger is \$182.31. By referring to page 225 of

Exhibit No. 2 we find that this consists of a lot of miscellaneous items covering rope, planking, staples, chains, spikes and other merchandise such as would naturally be used in the construction of the boom.

The next item on the ledger account charged, we find is \$2143.62. By referring to page 267 of Exhibit No. 2 we find that \$17.40 of this item was for staples, rope and planking and that \$2126.22 is for Sundries, and by referring to page 468 of Exhibit No. 3 we find that these sundries consist of boom-sticks, staples, piling and chain, amounting to \$922.22, \$1194.00 for driving 289 piles at \$3.00 apiece, and also four days labor at \$10.00 or a total of \$1204.00, the two amounts making the total of \$2126.22 sundries.

The next item of charge upon this ledger account we find is "Sundries, \$7.42," which item may be explained by referring to page 565 or page 322 of Exhibit No. 3, and is evidently for merchandise. On the credit side of this account in the ledger we find entries which will explain the manner in which or by whom these charges against the Coos River boom were paid. The first item of credit is for the return of some planking amounting to \$50.10. By referring to page 322 of the Journal (Exhibit No. 2) we find a credit

by Sundries of \$356.59, and by referring to pages 564, 565 and 566 we see they were charges against the individual accounts of Wulff and Young, but in reality are credits upon the Boom Account in their favor in that sum. The last item of credit upon that account is a balance of \$1937.36; this balance is carried forward to the Ledger marked Exhibit No. 5 at page 18 thereof, and is charged against said boom account, together with other items of expense amounting in all to \$89.86, making a total of \$2047.22, which charge is balanced by credit, first to Mill Account, of \$256.15, which is explained by Journal entry at page 322 and the entry in the Day-book (Exhibit No. 3) as page 564, and by a further credit of \$1,791.07 by Sundries, and we find by referring to page 659 of Exhibit No. 3 that the Mill Account is charged with \$895.53 and Young and Wulff with \$895.53. Therefore, taken in connection with all the testimony it shows that this boom was built some time in the years 1881 and 1882, and that it was paid for partly by its earnings in catching logs and that the difference between its earnings and the cost was shared by the original parties, E. B. Dean & Co. one-half, and Young and Wulff one-half.

By examining Exhibit No. 4, at page

80, which account evidently covers the earnings of the boom subsequent to and perhaps during its construction, we find that the boom account is charged with \$302.69, one-half of the balance, and Young and Wulff credited with one-fourth of the balance, \$151.35 and Klahn and Bernitt are credited with one-fourth of the balance, \$151.35. We also find that Klahn and Bernitt are charged with \$750.00 for one-fourth of the boom, and that Young and Wulff are credited with that amount, and by referring to page 163 of Exhibit No. 5, Bernitt and Klahn's account, we find that they are charged with \$750.00. Mr. Bernitt's testimony, beginning at pages 138 and 139 of transcript explains that E. B. Dean & Co. and Young and Wulff built the Upper Boom, or had it nearly completed when he and Klahn took their quarter interest in it, and he and Klahn helped catch the first logs caught in that boom, and also helped deliver them, and at that time the boom was hardly completed, and were charged \$750.00 for their interest in the Upper Boom. Subsequently about the year 1883 or 1884, he purchased William Klahn's interest. The witness identified a writing purporting to be a bill of sale made by William Klahn to him, E. W. Bernitt, which writing was introduced

in evidence and marked Plaintiffs' Exhibit No. 8. He also corroborated the books in his testimony by stating that a part of the earnings of the Upper Boom were turned in and were used in payment for a part of the cost of construction.

The Lower Boom was built subsequent to the Upper Boom, and no exact date is fixed for its commencement or completion. Bernitt says (at pages 141 and 151 Trans), that they were three or four years building it; that Mr. Wulff, Dean & Company and he paid for it; that he thinks it was begun, or part of it was built while Mr. Klahn was a partner, but it was not charged up on the books of the Boom Account until after Klahn had sold out. By referring to Exhibit No. 8, the Bill of Sale for Klahn's interest to Bernitt, we find this is dated September 27th, 1884. The natural conclusion therefore is that while some of the work might have been done or begun in 1884 it was not completed for several years afterwards. Again (at pages 167-168 of Trans.) Bernitt says, in effect, answering the question as to whether the boom was built in 1882, 1883 or 1884, that they spent about \$4500.00 on it the first two years and continued to build on to it for several years afterwards. Mr. Wulff says (at page 135 Trans.) that it was

built two, three or four years after the Upper Boom. The testimony of both of these parties is to the effect that they, the raftsmen, paid for one-half of this Lower Boom. Mr. Wulff, however, the testimony shows, is a very old man, about seventy-four years of age, and has not thought of this matter for many years, and in fact his partner during this time was the chief business head of his rafting concern, that is Wulff and Young.

By referring to the books we find in Exhibit 6 at page 111 there are certain credits to the Coos River Boom account which are partially explained by the witness John C. Merchant. By referring to Exhibit 7 at page 517 there appears a credit of the total sum of \$1402.10, one-quarter of which is charged to Wulff, and one-quarter of which is charged to Bernitt. This apparently was some time about the year 1885, and the witness W. T. Merchant (at page 128 Trans.) in referring to the Coos River Boom account, as shown on Page 111 of Exhibit 6, says that this account evidently covers both booms for the years 1885, 1886 and 1887, and attempts to segregate the items of general expense from the construction account and enumerates the items there appearing going into the construction account of the Lower Boom, which has the

apparent total of \$1038.07. While these amounts given by the witnesses in explaining the book entries are more or less disconnected and may be somewhat indefinite, yet they at least corroborate the claim of these appellees as to who built the booms or who paid the money that went into their construction. It must be assumed therefore that both of these booms were constructed by the appellants and the appellees' predecessors jointly.

So far as the ownership or the legal title to the land itself, these appellees make no claim except as to the easement, the right, privilege or license granted to them to use them for operating these particular logging booms thereon. The answer of the appellant Smith-Powers Logging Company admits the ownership of the legal title of these lands.

The testimony and the record thus far outlines and establishes the fact that there was a partnership or at least joint ownership of these booms in the beginning, and this testimony has in no manner been controverted by appellants.

There is no written evidence, except the books of E. B. Dean & Company, that Dean & Company or the partners constituting that firm ever assigned any interest in the land to the appellees or

their predecessors; but these books are the books of account of E. B. Dean & Company covering the period in which the booms were constructed, and the time this original agreement is first claimed to have been entered into. They have been identified by witnesses W. T. Merchant and John C. Merchant, sons of one of the members of the partnership of E. B. Dean & Company, the member of that firm who made the agreement with Young and Wulff and Klahn and Bernitt originally. Their association with the business was more or less intimate as long as their father was connected with it, and even afterwards they had access to these books and knew that they were the account books used during these years. (See testimony of W. T. Merchant and John C. Merchant generally).

In regard to the accounts referred to in these particular books, designated as Coos River Boom Account, the testimony of the witnesses W. T. Merchant, John C. Merchant, P. L. Phelan and W. F. Squire establishes beyond question that during the time they had access to the books and were conversant with the details of the transactions of the firm of E. B. Dean & Co., of C. H. Merchant as Receiver for E. B. Dean & Co., and the Dean Lumber

Company, covering a period of at least 15 years, this account only applied to the items affecting the two booms in controversy; that is the charges for material and labor which went into their construction, maintenance and operation, and the credits received from their earnings.

The next important point for the appellees to establish is their right to these interests, they not having been the original parties to it, with the exception of a one-eighth interest originally obtained by Bernitt. In establishing the fact that the agreement did exist in 1881 or thereabout, the appellees proved the fact that Bernitt was at least one of the original builders of the Lower Boom and that he and his rafting partner Klahn purchased a part interest in the Upper Boom. However, his testimony would seem to establish the fact that they procured their one-quarter interest before the Upper Boom was completed, and therefore that the \$750.00 paid by his partner and himself was at least used in its completion. However, the books themselves show that they came into the transaction shortly after the principal charges were made for the construction of the Upper Boom, and that ever since said time Bernitt at least was recognized in all the dealings had in connection with

its operation, maintenance, additional construction and earnings. To establish the conveyance to himself from his former partner Klahn, of his one-eighth interest, Exhibit No. 8 was introduced. This instrument was executed in the year 1884 by William Klahn to E. W. Bernitt, more than twenty-nine years ago. That this instrument clearly sets forth the understanding of these partners, of their respective interests, at a time when the matter was fresh in the minds and memories of all parties concerned, can hardly be controverted. It is not conceivable that Klahn and Bernitt would have that understanding, without all the parties knowing just what they claimed. E. W. Bernitt has continued all these years to hold and claim his interests in those booms in conformity with that understanding expressed in the Bill of Sale (Exhibit No. 8), and no one has heretofore questioned that claim. He has not only continued to assert that claim but has continued in possession of and maintained and operated these booms and shared in their profits and losses with the others, until ousted by the appellant in the year 1909.

As to the interest, however, of Victor Wittick we are not quite so fortunate as to have such a clear record chain of title.

He must rely largely upon the testimony of his predecessors and their memory, which possibly may be in some instances faulty as to unimportant details. There is, however, no claim by the appellants, nor is such a theory tenable, that Wittick's interest in these booms or the right to use the land for boom privileges is in any manner different from that of the claim of E. W. Bernitt. If the appellee Bernitt by the testimony has established the original agreement is such as he claims, the testimony also shows that Wittick and his predecessors have contributed to the expense of the maintenance, operation and construction of the booms, and also participated in the profits thereof, and shared in the losses in like manner as Bernitt, and the owner of the other half interest. The testimony shows conclusively that if there is such an agreement as appellees claim, and E. B. Dean & Company had a half interest, Bernitt succeeded to a one-fourth, and Wulff and Young, the original partners, had a one-fourth. Wittick claims to have succeeded to, and there is nothing in the testimony to controvert the claim that he did succeed to, the interest of Young and Wulff. The testimony of George Wulff (at page 136 Trans.) is to the effect that he acquired

his partner Young's interest, and that he sold out to Haglund and Mattson. Mr. Wulff is also quite positive that, in selling to Haglund and Mattson, account was taken of his interest in the boom in fixing the price; that the value of the rafting gear which he sold to these parties in the same transaction was from twelve to fifteen hundred dollars; that he obtained \$2400.00 from them for the entire interest in the rafting gear and the booms. Alfred Haglund testified (Page 186 Trans.) that he and John Mattson bought a one-fourth interest from George Wulff, and he is quite positive that he was given a bill of sale for it at that time and that it was drawn up by Judge Hall, and that they paid Mr. Wulff \$2400.00 for said interest. This was about the year 1889. He continued to operate for about five years and sold out to Alex Tast; that his partner, John Mattson, sold out, before he did, to Robert Kruger. Alfred Haglund is quite positive in his testimony that he purchased the interest in the boom from George Wulff. The testimony of John Mattson is that he and Alfred Haglund about 1890 purchased George Wulff's interest in the booms; that he and Haglund owned these interests with E. W. Bernitt and with E. B. Dean & Company; that the interest he

and Haglund owned was a one-fourth; he also says that he sold out to Robert Kruger about a year and a half afterwards; and that he sold the interest he had in the booms, together with his rafting gear.

The purchaser of the Haglund interest was not available, having returned to Finland and having ceased to be a resident of the United States.

The appellant introduces the testimony of Robert Kruger, and there is an obvious attempt on the part of said witness to discredit the claims of appellees in these booms. However, (At page 293 Trans.) he states that there is no unfriendliness between himself and Bernitt, but he shows by his answers to the questions following on the same page that there is no friendship, but there must be a distinct and positive feeling of unfriendliness between himself and Bernitt. These men were neighbors in a small town for many years, yet the witness admits that they did not converse during that time. In one of his answers referring to Bernitt, he says that they never were friendly in the beginning. There is no question therefore, from his testimony, that he admits himself to be an unfriendly witness. All through his testimony, however, he admits that he and the oth-

ers at that time claimed an interest in the boom. He says that he paid \$500.00 for his interest (at page 288 Trans.) and he says (at page 289 Trans.) that Mattson did not claim he was selling him an interest in any partnership with Merchant or the Dean Lumber Co., but the rafting gear and the gear belonging to the boom.

The testimony of John Mattson (at page 450 Trans.) is to the effect that Robert Kruger paid him \$1450.00 and that he sold him a one-half interest in the rafting gear and also a one-eighth interest in the booms. John Mattson also relates a conversation he had with the witness Kruger in which he stated that he had forgotten what he had paid. Kruger has not denied this. Therefore one thing stands out clear in the testimony of that particular witness: the fact that he is attempting to evade a positive statement that he acquired or sold any interest in the boom. All through his testimony, however, he mentions the interest in the booms as being **his**, and also that his co-owners at that time claimed certain interests in the boom. But the person who sold to him testifies without equivocation that he did sell him a one-eighth interest in the boom, together with a one-half interest in certain logging gear, and that instead of paying the sum of \$500.00 he

paid him \$1450.00. The person who purchased from him, C. J. Hillstrom, (page 183 Trans.) states with no uncertainty that he bought a one-eighth interest in the booms from Robert Kruger and that he paid Kruger \$1600.00; that he thinks he bought that interest sometime in the year 1890. The witness Kruger in his testimony (page 289 Trans.) states that he owned his interest for eight or nine months and that he sold to Mr. Hillstrom for \$1500.00.

If Mr. Kruger originally purchased simply a one-half interest in certain rafting gear for \$500.00, it would seem unreasonable to suppose that he could hold that one-half interest for eight or nine months and then dispose of it for three times that price. There can be no misunderstanding as to what Hillstrom thought he was buying. C. J. Hillstrom sold his interest to John Anderson Emmett (page 184 Trans.) after he had owned that interest for about five years.

As before stated, the appellees were not in a position to procure the testimony of Alexander Tast, but the testimony of John Anderson, or John Anderson Emmett, (page 180 Trans.) shows that he purchased the whole interest owned by Tast and Hillstrom in the years 1894 and 1896 respectively. The testimony is quite

clear and distinct as to what he purchased and that he had a conversation with Merchant prior to agreeing to take it from Tast. His testimony shows that he sold his interest consisting of a one-fourth to Matt Klockars and Victor Wittick, one of the respondent plaintiffs in this case, and Exhibit No. 12, consisting of a bill of sale from Anderson to Victor Wittick and Matt Klockars, was introduced. This was the year 1900. Exhibit No. 13 consists of a bill of sale for Matt Klockars' interest to Victor Wittick. Witness Anderson is not very definite as to what he paid for his interest in the boom, and seems to think it was \$1600.00, but Wittick testifies he and Klockars were to pay him \$3,000.00. Wittick paid Klockars, as indicated (page 173 Trans.) \$300.00 for his one-eighth interest and assumed the indebtedness due against both of them amounting to \$2500.00, and paid it. Klockers did not pay any portion of the \$2500.00. This brings the interest of Young and Wulff down to the appellee Wittick.

The testimony of all these witnesses, even that of Robert Kruger, covering the question of the ownership in the booms, confirms the claim of the appellees as to their interest. The only dissenting testimony given at all is that of P. L. Phelan, wherein he states that Mr. Merchant

gave him to understand that the raftsmen's interest in the boom was to terminate at the pleasure of E. B. Dean & Company. Mr. Phelan was employed by E. B. Dean & Company for about three and a half years, from some time in 1893 to 1896. His testimony was given in July 1912. The conversations which he attempted to relate as having had with C. H. Merchant were anywhere from seventeen to nineteen years previous. He is probably mistaken. It is not reasonable to suppose that these raftsmen would invest several thousand dollars in the construction of these booms with the understanding originally that their rights were to cease at any time E. B. Dean & Company saw fit to appropriate their improvements. Men ordinarily do not do business that way; and even if Merchant had an idea that E. B. Dean & Company possessed any such rights, there is no testimony introduced showing that the original agreement or the agreements under which these raftsmen acquired these interests in the booms were, in fact, of any such nature. Mr. Merchant may have had this idea as to the legal effect of the agreement, on account of the fact that no written conveyance of any interest in the land had been made. However, neither of these appellees or their prede-

cessors were present or in any manner consulted, or acquiesced in any such statement. This testimony is entirely hearsay and incompetent, and was given over the objection of appellees' attorneys.

Mr. Squire, another witness and former Manager of the Dean Lumber Company, claims that he made various attempts to learn the exact status of the booms. His testimony shows that he and Bernitt frequently discussed the management, control and maintenance of the boom, but he never at any time sought to learn from him or respondent Wittick what interest they claimed (page 280 Trans.), but he admits (page 283 Trans.) that Bernitt told him that the raftsmen, meaning himself, Klahn, Wulff and Young, paid for half of it. This was about the year 1903.

The testimony shows that the firm of E. B. Dean & Company consisted of E. B. Dean, David Wilcox and C. H. Merchant at the time the booms were originally built. It shows that the raftsmen continued to own whatever interest they had in the boom all through the partnership of E. B. Dean & Company; that the partnership was somewhat changed in 1892 or 1893 by C. H. Merchant retiring from it, and at that time he ceased to be a partner and also ceased to act as the Manager,

and thereupon the witness Phelan acted as Manager for them on Coos Bay. There was no change in the operation of the boom, regardless of what Mr. Phelan may have thought about the ownership of it. Bernitt and the other raftsmen who claimed an interest with him continued to operate it, contribute their share towards its maintenance and participate in its profits and losses the same as previously.

Some time in 1896 C. H. Merchant again took charge of the E. B. Dean & Company interests, this time as Receiver, and all through the receivership the arrangements concerning the booms were continued as formerly, so far as the raftsmen's interests were concerned; they participated in the profits and losses, and operated and maintained the booms.

Subsequent to this, in 1903 the Dean Lumber Company, a corporation, appears upon the scene and they continue in the ownership and management of the E. B. Dean & Company property down to the year 1907. During all of this time the management, control, profits and losses of the boom were continued as formerly. The interests of the raftsmen were not disturbed.

In 1907 the property was sold by the Dean Lumber Company to C. A. Smith,

and for at least a year and a half subsequent to this time these appellees continued to operate, control, remain in the possession of the booms, and participate in the profits and losses as formerly, without any question on the part of C. A. Smith or Smith-Powers Logging Co.

The Smith-Powers Logging Co. claims to have acquired the interest in these booms some time in July 1907, according to its Answer on file in this suit. The testimony of the Managing Agent, A. H. Powers, and of C. A. Smith, is to the effect that it was agreed that the Smith-Powers Logging Co. should take over this property shortly after C. A. Smith purchased it in 1907, and that under and by virtue of that agreement the Smith-Powers Logging Company claimed the ownership of it from July 1907 (Page 343 Trans.) However, Mr. Smith does testify that the paper title possibly passed about March 1909 to the Smith-Powers Logging Company. Mr. Powers also testifies that he thinks it was some time about March 1909 that the paper title passed.

After the rafting season of 1907 and 1908 and some time in July 1908, or probably later although at paragraph XI of the answer it is alleged to be October 1907. Mr. Powers says he received his first information as to the appellees'

claim of interest in these booms, and at that time or a few days afterwards the Smith-Powers Logging Company rejected any claim of interest on the part of Bernitt and Wittick. At this time, however, the Smith-Powers Logging Company had no deed to the property.

The main point in view at this time is, that the first objection to the claim of ownership of these appellees and their predecessors was made by the Smith-Powers Logging Company, C. A. Smith, or whatever interests succeeded to Mr. Smith some time about August 1908. Mr. Bernitt says that in the summer or fall—he thinks in the fall of 1908, just before the logs began to come out, was the first time they knew that the Smith-Powers Logging Company, C. A. Smith or the C. A. Smith Lumber & Manufacturing Company claimed to own the whole of the booms.

Regardless, however, of the refusal of the Smith-Powers Logging Company or the C. A. Smith Company interests to recognize these rights in 1908, the appellees, both of them, appeared on the scene in the fall of 1908 when the rafting season began and, as their testimony shows, attempted to and did catch the logs, and attempted to and did raft them the same as formerly. The Smith-Powers Logging

Co. did not object to their working there, but in fact availed itself of their assistance, Mr. Powers even conversing with Bernitt about it. Subsequent, however, it prevented them from collecting all or any portion of the sums due for boomage or for their services in the rafting of logs and piling caught in the booms. This work they continued to do until toward the end of the rafting season in the spring of the year 1909, at which time they found they were completely ousted. Mr. Powers of course swears positively, as usual, that he hired these men by the day. This Bernitt denies, and Powers admits that he made no direct contract with them.

There is no attempt on the part of the appellants to show that their predecessors ever denied the interest claimed by appellees and their predecessors. The nearest attempt is the testimony of P. L. Phelan and W. F. Squire, the first named a former Manager of E. B. Dean & Company for about the period of three years, seventeen or eighteen years previous, and the latter a former Manager of Dean Lumber Company between 1904 and 1907. They, however, simply state what their understanding was, but both admit never having attempted to learn from the appellees or their predecessors

what interest they claimed to have in the premises, and admit that Bernitt, with whom they seem to have had all their dealings in connection with the boom, never stated to them what he claimed for himself and his other partners or co-owners. Yet Mr. Squire conferred with Bernitt repeatedly whether they (the raftsmen and the Company) should spend any more money on the booms than to keep them sufficiently in repair to do each season's work. (Page 278 Trans.) Showing that even Mr. Squire with his apparent ignorance of appellees' claims, considered them of sufficient importance that if any money was to be expended for permanent betterments, appellees interest was of such a nature that they should contribute toward the expense. These witnesses do not testify that they in any manner disturbed or attempted to disturb or change the conditions or agreement under which these parties were holding this property and carrying on this common enterprise. The fact is the business was carried on the same as in previous years and there was no attempt to disturb the arrangement. No occasion ever arose for appellees to question the status of the matter, or to do any more than had been formerly done. These witnesses do not testify that they or any oth-

er person informed these appellees or their predecessors what their idea of the nature of the relationship was or what the agreement was, or what they thought their claims to the boom amounted to, or that their principals revoked these agreements. Neither do they testify that their principals ever revoked this agreement as claimed by the appellees to have existed for all these years prior to the time they were employed as managers. They must have known what the claims of appellees were. The principals of the witness Phelan, were two members of the former partnership of E. B. Dean & Company, that is E. B. Dean and David Wilcox; they were the original members with whom this agreement was made, and their own account books show they kept track of the earnings of the boom and the expense of maintaining it, its costs of construction and profits, and charged all the expenses against those profits. When the profits were not sufficient to pay the expenses they and the other members contributed their portion to make up the difference. Appellants introduced no testimony to show that E. B. Dean & Company, C. H. Merchant as Receiver for E. B. Dean & Company, or Dean Lumber Company ever ousted Bernitt or his owners or partners, or notified them that

they denied their claim of ownership or partnership, but the testimony shows they permitted the matter to stand as it had always stood. If, therefore, under the original agreement, as shown by the testimony, the rights claimed by Bernitt actually vested in himself and his partners and co-owners, the record establishes that they continued at least down to the time C. A. Smith acquired title to the land and whatever interest he obtained in the boom.

Whether the facts relied upon by the appellees are sufficient to establish a claim of ownership in the booms themselves and an easement or irrevocable license to continue the use of the land for maintaining and operating booms, or whether these rights ceased at the will and pleasure of the owner of the legal title to the land, is a question of law.

The pleadings admit the ownership of the legal title to the land in the complaint described in paragraph four to have been in E. B. Dean & Company in 1881 and now to be in the defendant Smith-Powers Logging Company by reason of the purchase of the land through the grantees of E. B. Dean & Company.

It would seem to be very clearly established that the terms of the original con-

tract were in the nature of a partnership. This agreement was

“A contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and divide the profit and bear the loss in certain proportions.”

30 Cyc 349.

Cogswell vs. Wilson, II Or. 371.

4 Pac. 1130.

According to the testimony of Bernitt, which is corroborated by Wulff, the members of the firm of E. B. Dean & Company were to furnish the land to be used in the enterprise and one-half of the money to build the booms. Young, Wulff, Klahn and Bernitt were to furnish one-half of the money between them, equally, and to furnish the skill and labor in operating the booms; and all were to contribute in their respective proportions toward the maintenance of the boom and in like proportions share in the profits. The testimony shows that this was done by the original members during their ownership, and by them and their successors, in all for twenty-seven years, down to the time when the appellants took exclusive pos-

session of the property and ousted the appellees.

“A partnership has been defined to be a contract in which two or more persons agree to put in something in common with a view of dividing the benefits which result from it.”

Flower v. Barnekoff, 20th Ore. 132.
25th Pac. 370.

Citing, Strader v White, 2 Neb. 362.

“Where it appears that there is a community of interest in the capital stock, and also a community of interest in the profits and losses, then it is clear an actual partnership exists between the parties.”

Flower v. Barnekoff, 20 Or. 132.
25 Pac. 370.

Citing, Berthold v. Goldsmith,
24 How. 541.

“It is not necessary that there should be an express stipulation to share profit and loss in order to constitute a partnership. If it were understood between the parties that

there was to be a communion of profit, that would be a partnership."

Bloomfield v. Buchanan, 13 Ore. 108,
8 Pac. 912

North Pacific Lum. Co. v. Spore,
44 Ore. 462,
75 Pac. 890.

Berthold v. Goldsmith, 24 Howard
536,

16 U. S. Law. Ed. 762

Fleming v. Lay, 48 C. C. A. 752,
109 Fed. 955

Harvey C. Childs, 22 Am. Rep. 387
McDonald v. McLeod (Colo) 33
Pac. 285.

While the original undertaking was unquestionably that of a partnership, the changes subsequently made in the ownership of the different fractional parts of the whole render it somewhat confusing as to how long it continued to exist, and where the doctrine of co-ownership and tenants in common should be applied. It would seem that the mere retirement of Young and Klahn, the acquirement of their interests by their co-partners, Wulff and Bernitt, the continuance of the operation of the business the same as formerly without any objection by the members

of the firm of Dean & Company for eight or nine years subsequent, would be sufficient for the Court to imply that the other partners concurred in the change. After 1889 or 1890 there were many changes in the interests formerly owned by Wulff and Young, but it does not seem there can be any logical objection to the conclusion that upon each sale the partners concurred in the change. The business was conducted in all respects the same as in former years, and from the conduct of the parties, the Court would be justified in holding that there was an implied concurrence upon the part of the others to the entry of these various persons from time to time into the partnership, and the retirement of the others.

“A person purchasing a partner’s interest in a partnership may become a partner therein by the implied concurrence of the remaining partners, is a principal well established by law.”

30th Cyc 605.

E. B. Dean & Company kept the accounts and continued to share in the profits, made possible by the skilled labor of these other persons in catching and car-

ing for the logs and conducting the business of operating the boom, and dividing with them the expense necessary to maintain the boom, in the original proportion. It is true that these parties were not paid wages for attending to the catching, storing and sorting of the logs and timber that came into the booms by the partnership, but as the witness Bernitt has testified, E. B. Dean & Company was to furnish the lands, and after the boom was built the raftsmen were to attend to its operation and carry on the business of catching, storing and sorting logs, and operating the booms. However, the testimony shows that when repairs were necessary upon the boom, they were made by the raftsmen, and their wages as well as the material that went into the repairs were charged up against the earnings.

After C. H. Merchant took charge of the property of the firm of E. B. Dean & Company as the Receiver, the appellee Wittick acquired his present interest, about the year 1900. Whether under those circumstances it would be possible for an implied concurrence on the part of E. B. Dean & Company to the change in the interest of John Anderson Emmett, whom he purchased from, would of course be a question of doubt. It is also a ques-

tion of doubt as to whether upon the acquisition of the property by the Dean Lumber Company, the partnership did not cease to exist, owing to some authorities holding that partnerships cannot exist between natural persons and artificial persons.

If these appellees Bernitt and Wittick had any vested property rights whatever they could not be destroyed or annulled upon the caprice of their other partners or co-tenants. Whether these rights, subsequent to the dissolution of the partnership, continued to exist under the doctrine of tenancy in common or co-tenancy, that would not deprive appellees of the right of joint management, control and use of the property. Nor would it assist these appellants in their attempts to take from appellees their right to the use and enjoyment of the property involved.

While the appellees and the corporation Smith-Powers Logging Co. may not be partners, yet under appellees' claim of ownership they are at least co-owners. And

“Whether the relation of partners or co-owners exists, the rights of the parties are the same, at least so far as concerns the common property, as such; and a co-owner, equally with a

partner, may have an accounting and a receiver appointed."

Hackett vs. Multnomah Ry. Co.
12th Or. 124 6 Pac. 659-663

Calvert vs. Idaho Stage Co., 25th
Or. 412, 36 Pac. 25

Marx v. Goodnough, 16 Ore. 26-
31, 16 Pac. 918.

Mathewson vs. Clark, U. S. Sup.
6 How. 122 Law Ed. V. 12, 370.

Flower v. Barnekoff, 20th Or. 132,
25 p. 370

"It seems to be the better rule that though the exact relation of the parties may be improperly characterized an accounting will be proper if they sustain such relation to each other as that equity may assume jurisdiction."

I Cyc 437

Shirley vs. Goodnough, 15th, Or.
642. 16th Pac. 871.

The appellees' theory of the case is this. Although there may not have been any agreement that the land itself should become partnership property, or that appellees or their predecessors were to acquire

any legal title thereto, yet by reason of their entering upon the land at the solicitation of the members of the firm of E. B. Dean & Company, the owners, and making valuable and permanent improvements thereon with their knowledge and consent, and joint participation, that was sufficient to give them a right, license or easement in the land to continue to use and occupy the same with their boom, and maintain it and enjoy the fruits, and share in their proper proportion with the other co-owners or partners. As to whether they were partners with E. B. Dean & Company or that firm's successors and assigns, is not material, because whatever rights they may have had became vested and were acquiesced in and E. B. Dean & Company, through their authorized Receiver, and the Dean Lumber Company.

"One cannot induce another to go upon his lands and make valuable improvements, and then revoke the license to his prejudice."

Hallock vs. Suitor, 37 Ore. II,
60th Pac. 384.

Curtis vs. LaGrande Water Co., 20
Or. 34, 23 Pac. 808.

Miser vs. O'Shea, 37 Or. 231
62 Pac. 491

82 Am. St. Rep. 751

Shaw vs. Profit, 110 Pac. 1092.

“If a party has paid a consideration therefor or been encouraged by any participation in a common enterprise, or induced by a definite oral agreement to expend money in making permanent valuable improvements, the parol license upon the faith of which he has acted in executing it cannot be revoked to his prejudice.”

Ewing vs. Rhea, 37 Or. 583

62 Pac. 790

52 L. R. A. 40

82 Am. St. Rep. 783

Shaw vs. Profit, 110 Pac. 1092

57 Or. 192

“Where money has been expended on property licensed, by making improvements, equity regards it as an executed contract and will not permit it to be revoked, regarding it substantially as an easement, the revocation of which would be a fraud on the licensee.”

25 Cyc 646, and Note 46

Shaw vs. Profit, 57 Or. 192

109 Pac. 584 & 110 Pac. 1092,

and earlier cases.

But it has been repeatedly held in our local Courts:

“That a parole license cannot be revoked after the licensee has expended money or performed labor in making valuable improvements on the land on the faith thereof.”

Bowman vs. Bowman, et al, 35 Or. 279 57 Pac. 546.

Coffman v. Robbin, 8th Or. 279.

Huston v. Bybee, 17 Or. 140,

20 Pac. page 51.

Combs v. Layton, 19th Or. page 99

26th Pac. 661.

Curtis v. LaGrande Water Co., 20th Or. Page 34, 23 Pac. 808.

Also 25th Pac. page 378.

McBroom v. Thompson, 25th Or. 559 37th Pac. 57

Garrett v. Bischopp, 27th Or. 349

41 Pac. page 10

Sumpter Railroad Co. v. Gardner, 49 Or. 412

90th Pac. 499.

Shaw v. Profit, et al. 57th Or. 192,

110 Pac. 1092.

“Cases may arise, and have arisen, where a license to occupy land has been intended and understood as a

mere personal favor to the licensee to give him a place to live or to occupy for some other beneficial purpose not transmissible, but revocable at will. Then expenditures would naturally be made accordingly. In other cases the granting of the license has been in terms an assurance of permanent possession. It is evident the same rule cannot apply to both cases. The revocation of the license even after expenditure made on a consequence of it is a right, in the other a fraud."

Metcalf v. Hart, 3 Wyo. 513-547
27 Pac. 900, 31 Pac 407

Cited in

Shaw v. Profit, 110 Pacific 1092.

STATUTE OF FRAUDS

"Where an oral contract, which is unenforceable by reason of the Statute of Frauds, has been entirely performed, the rights of the parties are no longer effected by the statute, and it is immaterial that either party might have refused to perform. Where oral agreements creating interests in land have been carried into effect by the acts of the parties, the

rights thereunder are not effected by the statute of frauds."

20 Cyc 302-303. Note "69"

"An executed license is treated like a parole agreement in equity, it will not allow the statute to be used as a cover for fraud."

Curtis v. La Grande Water Co. 20 Or. 34 23 Pac. 808, 25 Pac. 378

"The decisions of Courts of Equity on that statute (Statute of Frauds) proceed on the principle, not that the right passes by parol license or agreement, but that wherever one party has executed it by payment of money, taking possession and making valuable improvements, the conscience of the other is bound to carry it into execution, and equity will compel him to do it."

Maple Orchard & Co. vs. Marshall,
(Utah) 75 Pac. 369

"This Court has adopted the rule that if a party relying upon the faith of

an express parol agreement, makes permanent valuable improvements upon an estate, which may inure to the advantage of the owner thereof, the license upon the faith of which the improvement was made cannot be revoked to the prejudice of the party executing it."

Miser vs. O'Shea, 37th Or. 231,
62 Pac. 491.

"While ordinarily an easement can be created only by writing under seal, it may be created by adverse user, by estoppel or part performance of an oral agreement."

"Estoppel not necessary to plead, and in some instances need not be alleged. The contract set up in the Complaint operates as an estoppel."

Shaw vs. Profit, 57 Or. 192,
110 Pac. 1095.

It may be urged that while the right, license or easement under which appellees claim to hold, would be good as to E. B. Dean & Co., or the members of that

firm, it would not apply to the different and succeeding grantees. That the conveyance of the whole legal title by the partnership of E. B. Dean & Co., or any of their grantees would be a revocation thereof.

This, however, is not the rule, because

“A license, irrevocable as to the licensor, is binding on the grantee taking with notice.”

Shaw vs. Profit, 57th Or. 192,
110 Pac. 1094

“It is a well settled principle that to constitute notice it is not necessary that it should be in the shape of a distinct formal communication, and it will be implied where a party is shown to have had such means of informing himself as to justify the conclusion that he has availed himself of them.”

“Notice should with rare exception be implied where a party is shown to have such knowledge as would superinduce further inquiry in an honest, conscientious man.”

Carter vs. City of Portland, 4th Or. 350.

NOTICE TO GRANTEE OF LICENSOR

“Possession operates as constructive notice to him.”

2 Pom. Eq. 613.

Petrain vs. Kiernan, 23 Or. 455,
32 Pac. 158

McDougal v. Lane, 39 Or. 212,
64 Pac. 864

Shaw vs. Profit, 57 Ore. 192,
109 Pac. 584
110 Pac. 1092.

This, therefore, brings the case down to the time that the interests of C. A. Smith intervened. The appellees admit that it is not tenable to claim under the evidence that C. A. Smith was a partner. The testimony of Mr. Smith and Mr. Powers, and of other witnesses, show that he purchased the property of the Dean Lumber Company in February 1907; that he did not know these plaintiffs or know of their claim, and that he agreed with Mr. Powers about the time of the purchase that the property should be turned over to a logging corporation which they would organize. The appellants seek to set up in their answer and raise the issue that Mr. Smith and Smith-Powers Logging Co., were innocent purchasers and

without knowledge of the claim of appellees or of their possession. Mr. Smith in his testimony admits that he was not here at the time the transfer was made in February 1907, at Sacramento, California, (page 223 Trans). He saw the boom two months before he purchased it but did not have anybody else inspect it at the time or before he bought it, with a view of ascertaining whether anyone was in possession, and if anyone was in possession he did not investigate.

Mr. Powers testifies that he was over to the booms some time in February 1907 and while he at first seeks to evade the admission that there were any logs in them whatever, he finally does admit that he noticed some logs or rafts over there in that vicinity. The uncontradicted testimony of the appellees, and it is also the testimony of the appellants, that the rafting season for handling the logs coming down in freshets from Coos River and its tributaries is from October and November to March. The testimony is that some times the seasons are a little earlier than others, and some times they are a little later, but the month of February itself is the month when there is no question about the raftsmen being required to be busy catching logs in the boom and rafting

them therefrom. The uncontradicted testimony of Bernitt is, that during the month of Feruary 1907, he and Wittick were over there rafting and catching logs in the boom; that either he or Wittick or some of their men were there and in possession of the boom at all times; and that they had scows there in which they lived. These boom-rights used and exercised by these raftsmen as partners and co-tenants or otherwise had been in use and under their dominion for a period of over twenty-seven years. The community is small. The purchaser of the Dean property, Mr. Smith, is a man skilled in the saw-mill and logging business, and in purchasing property of that character. If he acted prudently, he would investigate not only the paper title to the property, but also its physical condition. Where it was property of this character which required the co-operation, work, skill and labor of other persons to care for, handle and operate it, it would certainly seem strange if he did not investigate the manner by which it was operated, who the parties were, and all the details in connection with it. Undoubtedly the books and accounts of the Dean Lumber Company were open to his inspection, and were by him or his agents duly inspected. These appellees were in the ac-

tual possession of these premises, catching logs therein, and were living with their crews of men thereat and making up rafts therein and rafting therefrom. The booms were at that particular time earning money for their co-owners, and the credits and charges were being made upon these books of the Dean Lumber Company covering these earnings and charges. In view of all of this it is hard to see how Mr. Smith can successfully take the position he is an innocent purchaser and had no notice. There was at least sufficient notice to put him upon inquiry; he did not make any inquiry of these appellees so far as the testimony discloses, neither did he consult them in any regard, either in person or by agent. Did not even examine or cause the booms to be examined (page 223 Trans.) The testimony of Mr. Bernitt (Page 448 & 449 Trans.) is to the effect that the booms were full of logs from some time in December 1906 to and including March 15th 1907, and that these appellees were in possession catching logs, sorting them, making up rafts, living there with the scows a part of the time, had their men employed in the work living there, and that they were furnishing logs for the very mill which Mr. Smith purchased from the Dean Lumber Company, and al-

so were furnishing logs therefrom to the mill of the Simpson Lumber Company, the two principal mill industries of Coos Bay. If he had no notice, certainly there was a negligent lack of interest or inquiry upon the part of Mr. Smith or his agents.

Going on down further to the grantee of C. A. Smith, to-wit, the Smith-Powers Logging Company, a creature of his own creation and control: Both he and Mr. Powers testified that he is the principal officer, controlling and majority stockholder of the C. A. Smith Lumber & Manufacturing Company; that he is the President and a director, and holds in person a few shares of the stock of the Smith-Powers Logging Company; but admits that the C. A. Smith Lumber & Manufacturing Company is the owner of the principal bulk of the stock of the Smith-Powers Logging Company. Mr. Powers also says (page 394 Trans.) that the principal objects and purposes of the corporate existence of the Smith-Powers Logging Company is to furnish logs and carry on and take charge of the logging business of the C. A. Smith Lumber & Manufacturing Company. It was decided when the Dean Lumber Company property was purchased that they would form this logging company, and it was

so formed. With Mr. Smith's knowledge, or at least his implied knowledge, of the claims of these appellees he cannot successfully evade and dispossess them of their rights by creating a corporation of his control and conveying this property to it and having the title vest in it as an innocent purchaser.

Waiving, however, for the moment, the legal aspect of that question, and reverting to the facts as they appear in the testimony. It cannot be said therefrom that the Smith-Powers Logging Company was without notice. At the time of the purchase by Mr. Smith these appellees were actively engaged in operating the boom and were in possession of it under the terms and conditions of the original partnership agreement, and they so continued until long after Mr. Smith had acquired the legal title. Mr. Bernitt, in his testimony, was somewhat mixed as to the date of his first meeting Mr. Powers, and was evidently mistaken when he stated that the year was 1908, and so was Mr. Powers, because subsequently they correct themselves a number of times and state it was the year 1907. This is corroborated by the testimony of Mr. Squire, and other circumstances. The testimony, however, of Mr. Powers and Mr. Bernitt is irreconcilable upon one point: Mr.

Powers states positively although his answer alleges the time to be October 1907, that he did not know of the claim of these appellees until the following year, after he had sent his man Varney over the boom to reconstruct it. Then he learned it through a man by the name of Wicklund. On the other hand, Mr. Bernitt testified that in the year 1907, some time about July, he had a conversation with Mr. Powers, and that Mr. Powers told him that Mr. Smith wanted him to purchase the boom property, but that he would have nothing to do with it as long as Bernitt and Wittick had an interest in it (Page 148 Trans.) Mr. Powers is mistaken, and did have knowledge of these claims despite his positive assertion to the contrary. This, the testimony of Mr. Arno Mereen, whose occupation is General Superintendent of the C. A. Smith Companies, seems to establish. Mr. Mereen says that he had full charge of the business. This of course refers to the C. A. Smith Companies. He testifies (page 334 Trans.) that in 1907 he had a conversation on the dock in front of the old Dean Lumber Company's store with Mr. Bernitt, one Sunday morning; that he (Bernitt) and Mr. Powers had been talking in connection with some claims that he was making relative to the ownership or

partnership in the boom with Dean Lumber Company, and he (Mr. Bernitt) still claimed he held an interest in them. The witness says that Mr. Powers called his attention to it, and he, Mereen, then told him that they did not know him in the deal at all and that they could not recognize him in any such deal. They knew of no such claim in taking over the property, and that they were not aware that there was any such deal. Mr. Bernitt, in relating the substance of the conversation which he had with Mr. Mereen, differs somewhat in detail, but agrees in substance. He says that it was either the Spring or Summer of 1907 on a Sunday morning that he met Mr. Mereen on the wharf. Mr. Mereen also states that it was on a Sunday morning. Mr. Bernitt said that Mereen was standing there with some other gentlemen, but he did not remember just who they were, and, "As I came along he says to me, 'I understand that you and a party in North Bend claim a half interest in that boom over there.' I told him that we did, and he said that that was no way to have it, that they had to own it all or none." That this was in the summer of 1907, and that the next conversation he had with Mereen was about some 90 foot boom sticks, that fall (page 106 Trans.) Mr. Bernitt says that

he is not sure whether Mr. Powers was there or not. Mereen also remembers the 90 foot conversation in 1907 (page 334 Trans. Mr. Powers (page 358 Trans). gives his version of this conversation and says he was present. Mr. Powers, in trying to fix the date when it was agreed between the Smith-Powers Logging Company and C. A. Smith that that company should take over the boom, fixes it in July or August of 1907, but he thinks it was in August (page 374 Trans.) He says, on page 524, of the testimony, that the price for the booms was charged on the books in the fall of 1907. By referring to Exhibit "C" of the appellants' testimony, which is a statement of charges and credits concerning these booms, and the extensions and enlargements thereof, there is one item appears entered \$2000.00 for booms. This was, according to the statement, entered at a much later date, sometime in 1909. Mr. Brown in his testimony indicates that this was the item which the Smith-Powers Logging Company paid or agreed to pay C. A. Smith of the C. A. Smith Lumber & Manufacturing Company for the property. It is established by the testimony that the legal transfer of this title was not made until 1909.

Mr. Powers testified that in his conver-

sations with Mr. Bernitt in 1907 he told him to go ahead and do the rafting and handle the boom the same as he had always handled it previously (page 354 Trans.) Mr. Powers did this, according to his own testimony, without obtaining a statement from Mr. Bernitt as to what he and Mr. Wittick claimed with respect to the boom, or any details in connection with it. This looks as if Mr. Powers had made another mistake in his testimony. It hardly seems reasonable that a business man with the responsibilities of one in his position would not go into details more deeply, nor does it seem reasonable that these two men would discuss all matters and things pertaining to the boom and omit the most essential part of all, particularly in view of the contemplated purchase by Mr. Powers' company.

However, unless Mr. Smith was an innocent purchaser and purchased without notice, or without sufficient notice to put him on inquiry, it could hardly be said that the Smith-Powers Logging Company could claim lack of notice. Mr. Powers is Vice-president and Managing agent of the Smith-Powers Logging Company and Mr. Mereen is the General Superintendent of the C. A. Smith Companies, but admitted knowledge of the

claims prior to the purchase or making of deed in 1909. The Smith-Powers Logging Company certainly had knowledge of these claims according to their testimony.

The fact that there was no deed or other instrument of record upon the records of Coos County showing title in appellees at the time Mr. Smith purchased the tide-lands is not sufficient to make him an innocent purchaser.

The uncontroverted testimony shows that appellees were in exclusive possession of the booms all during the month of February 1907, and exercising acts of ownership over it (Page 449 Trans. and Bernitt's and Wittick's testimony). They and their predecessors had been in such possession for many years.

This lack of a record title in appellees therefore is no protection to Smith. Such possession was sufficient to put him on inquiry, because

"It is presumed that things in the possession of a person, are owned by him, and that a person is the owner of property from exercising acts of ownership over it."

799 L. O. L., Subdivisions 11 and 12.

"Possession is notice of equitable

rights in property sufficient to put purchaser on inquiry.”

Stannis v. Nicholson, 2 Or. 332.

Bohlman v. Coffin, 4 Or. 313

“No equitable doctrine is better established than that * * * the person who purchases an estate, although for a valuable consideration, after notice of a prior equitable right, makes himself a mala fide purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat.”

Bohlman v. Coffin, 4 Or. 317.

“One who buys land on which a third person has possession of a ditch, and is using the waters thereof, takes with notice of the other’s rights, and subject to his interest, whatever it is.”

Baldock v. Atwood, 21 Or. 73, 26 Pac. 1058.

“A purchaser of property, failing to make inquiry of a stranger in possession, is in law chargeable with bad faith, and cannot claim the rights of a bona fide purchaser.”

Randall v. Lingwall, 43 Or. 383.

73 Pac. 1.

Hawley vs. Hawley, 43 Or. 352.

73 Pac. 3

“Whatever is sufficient to put a subsequent purchaser on inquiry must be considered legal notice to him of all the facts inquiry would have disclosed by the exercise of reasonable diligence.”

McDougal vs. Lame, 39 Or. 212,

Jennings v. Lentz, 64 Pac. 864

50 Or. 483. 93 Pac. 327.

Cantwell v. Barker, et al., 62 Or. 12, 124 Pac. 264.

The testimony of the witnesses show that the prevailing price charged for many years for the use of these booms and at the time these appellants took full control thereof was the sum of twenty-five cents a thousand feet for any and all

logs that were caught therein, and a quarter of a cent per lineal foot for piling. This according to the statement furnished by the defendants and introduced in testimony, and also in accordance with the testimony of Mr. G. A. Brown, the book-keeper of the Smith-Powers Logging Company, is the price that the Smith-Powers Logging Company has charged for all logs and piling going through the booms since they took exclusive possession of it.

“Where common property is occupied adversely or to the exclusion of the other common owners, by some of the co-tenants, those so occupying are liable for so much of the rental value and of the profits thereof as exceed their proportionate share.”

38 Cyc 66.

“The right of tenants in common to share in the profits of the common property and resort to a Court of Equity for an accounting and a receiver in the case of exclusion of one tenant by another would seem from the necessity of the case and obvious

principles of justice to be authorized.”

Hackett vs. Multnomah Ry. Co.,
12th Or. 83 6th, Pac. 663.

The appellants naturally claim that in case they are compelled to pay the rental of these booms and for the logs that have passed through, they should be entitled to an offset by reason of the expenditures made by them.

The following, however, is the well established rule:

“That where a tenant in common may recover contribution for necessary repairs, it is held that he cannot do so except on notice and an opportunity to the others to unite in making the repairs, unless made under such circumstances as excuse want of notice.”

38 Cyc. 57

That appellants can claim they gave appellees an opportunity to unite in making these repairs, of course is out of the question and entirely at variance with their pleadings and the testimony which

they have introduced in this case. The testimony shows that the appellees are residents of the locality in which the boom was operated, that they were eager and willing to participate in the operation of the boom. The testimony of the witness Bernitt is to the effect that he told Mr. Powers that they would be willing to make extensions and repairs but could not afford to buy a lot of additional lands, and suggested that they take the Simpson Lumber Company in with them, the Smith-Powers people to retain one-third, the Simpson Lumber Company one-third, and Bernitt and Wittick one-third (Page 217 Trans.), and that he proposed this, with Mr. Powers' sanction, to Mr. L. J. Simpson, at that time Manager of the Simpson Lumber Company. Mr. Simpson in his testimony corroborates this portion of Mr Bernitt's testimony, but Mr. Powers denies it.

A great deal of testimony has been introduced on the part of the appellant Smith-Powers Logging Company with regard to certain improvements and expenditures of large sums of money in reconstructing, extending, enlarging and making permanent the booms in question, not only in the enlargement and reconstruction of the booms, but for the purchase of additional lands and the con-

struction of other booms upon them; also in the expenditure of money for surveying and procuring permits from the Government for the maintenance of these log booms. Appellants have introduced in testimony, subject to the objection of appellees, two statements marked for identification "Exhibit C" and "Exhibit D," purporting to show certain expenditures made upon the booms, but it is a well settled principle of law that

"A tenant in common is not ordinarily responsible to his co-tenant for the cost of improvements or repairs upon the common property unless he so agreed or ratified the act of making them, or unless it is shown that the improvements or repairs were absolutely necessary to the enjoyment or preservation of the property."

38th Cyc 56.

Cooper v. Brown (Iowa) 136 Am. St. Rep. 768

Rico Reduction Mining Co. v. Murgov, 23 Pac. 458

Newman v. Dreyfust, 11 Pac. 98

Welland v. Williams (Nev.) 29 Pac. 403.

The appellees have not agreed to or

ratified the act of making any improvements. Appellants assert ownership of the entire title, and unequivocally deny the claim of these appellees. Appellant Smith-Powers Logging Company ousted appellees, and took exclusive possession of the property, and in this suit defends upon the basis of ownership of the entire property.

Appellants cannot excuse themselves of their own wrong in ousting appellees and dispossessing them of their property by showing the expenditure of large sums of money in the reconstruction of these booms and the extension and the purchase of adjoining lands, and building or extending booms thereon.

“A tenant in common cannot enforce contribution if he asserts ownership of the entire title as against his co-tenants.”

38th Cyc 58. See note 36.

“They cannot offset their improvements against the rent if they held adversely, even believing in good

faith their own title to be the better.”

Bodkin vs. Arnold, 48 W. Va. 108,
35 S. E. 90

“Co-tenant is not entitled to contribution as a matter of right, but merely from a desire of the Court to do justice between all the parties.”

Ballon v. Ballon, 94 Va. 356, 26th
S. E. 840. 64 Am. St. Rep. 733.

OUSTER

The appellants' answer pleads a denial of appellees' interest, and contains allegations of whole title and possession in appellees.

This is sufficient to support the allegations of ouster contained in the complaint.

38 Cyc 37

Grant vs. Paddock, 30 Or. 312. 47
Pac. 712.

The evidence shows, and answer ad-

mits, ouster when appellants prevented appellees from collecting their charges.

“The question whether the acts amounted to a dissiezin is a question for the Court.”

38 Cyc. 39

DEMAND FOR ACCOUNTING

Mr. Bernitt testified (pages 152-153 Trans.) that he demanded statements of the condition of the earnings of the boom, of Mr. Brown, the accountant and book-keeper of the appellant Smith-Powers Logging Co., and Mr. Brown (page 296 Trans.) admits a demand by Mr. Bernitt, yet it is the contention of appellees in this suit that even although such demand was not made, or if the Court should not find any testimony that a sufficient demand had been made, the fact that appellants denied appellees' claim of ownership of title and denied that they are entitled to the accounting by reason thereof obviates the necessity of any demand, which theory is supported by the following citations:

“Where defendant denies plaintiff's title and pleads ownership in himself or another, he cannot defeat re-

covery on the ground that plaintiff did not allege and prove demand before suit."

Rosenau vs. Syring, 25th Or. 386.

35 Pac. 844.

Bolling vs. Kirby, 90 Ala. 215, 24 Am. St. Rep. 789, and notes beginning 816-818.

Ambler vs. Whipple, 20 Wall 546, 22 Law Ed. U. S. 403

"One need not demand payment of a claim before suing thereon, where it appears that a demand will be fruitless."

Kimball vs. Farmers & Mechanics Bank, 97 Pac. 748. 50th Wash. 610.

THE BURDEN OF PROOF

The testimony shows, and appellants' answer admits, that appellees and their predecessors did contribute toward the construction of said booms, were in possession of, did operate and control, and charge and collect the sums of money for its use, in effect as alleged in the complaint. By way of avoidance, however,

appellants allege that no partnership agreement was formed or attempted to be formed, and that appellees did not own or claim title until the beginning of this suit.

If this was merely such a permissive enjoyment of the booms as appellants claim, such allegations constitute an affirmative defense, and the burden of establishing it is upon the appellants.

“Where a defendant pleads an affirmative defense or sets up in his Answer facts in avoidance, the burden of proof is upon him.”

16 Cyc 931.

“While an adverse right cannot grow out of mere permissive enjoyment the burden of proving possession thus claimed to have been held by such permission or subserviency is cast upon the party attempting to defeat such claim.”

Gardner vs. Wright, 49 Or. 609. 91 Pac. 293.

The appellants specify seventy-three errors of the Court below.

The first error complained of is to the

ruling of the Court that it was unnecessary to decide the character and nature of the appellees' interest in said booms.

The Court did find that their interest in the booms was a valuable right or license of which they ought not to be deprived without remuneration according to the value of the plant. The Court held that it was irrevocable to the extent that it could not be appropriated without remuneration.

The evidence shows what that interest of the appellees was, how it came to be, and that it continued to be recognized for a period of nearly twenty-nine years. The undisputed testimony shows that this right or license was recognized by all of E. B. Dean & Company's successors, and even by the appellants in this case for a period of at least over eighteen months after it was acquired by Smith.

In specifying the errors claimed by appellants they have not discussed in detail how the Court is in error, except some are touched upon in a general way under the head of Points and Authorities. Therefore it is impossible for appellees to anticipate. The preceding statement of the case together with the authorities cited therein, and also the portion of this

brief following, it is felt fully rebuts and covers such objections.

Answering Appellants' Points and Authorities:

I

The question of statute of frauds, or Section 808 of Lord's Oregon Laws is previously discussed.

II

Counsel for appellants claims that there is no evidence showing a partnership agreement, but insists the testimony supports their theory of a working agreement only.

The testimony of Wulff (p. 135 Trans.) shows that Dean & Company contributed only one-half toward the cost of the booms, and the appellees and their predecessors the other half. This is supported by the testimony of Bernitt (pp. 138, 139, 141 Trans. and various other places) and the entries in the books of E. B. Dean & Company (Exhibits 1, 2, 3, 4, 5, 6 & 7) referred to in detail in the fore part of this brief. This testimony is not controverted in any particular and establishes the fact that the rafters contributed one-half toward the construction of the booms. Does such a state of facts support or oppose appellants' theory of a

working interest? If it was a working interest only, Dean & Company would have required them to contribute only their skill and labor. The testimony of Bernitt (pp. 142 & 143 Trans., and other places) shows this agreement was at the solicitation of Dean & Company.

III

Appellants claim if a partnership existed, appellees permitted, consented to and ratified the sale by E. B. Dean & Company to Dean Lumber Company and cannot now question the subsequent transfers. They cite a number of authorities to support the rule that a sale by one partner may be ratified by the other partners. Such may be the rule, yet how does it apply in this instance? There is no testimony that appellees knew when the sale to Dean Lumber Company was contemplated or was being made, or that it was made until after conveyance passed. The undisputed facts are that appellants continued in the possession, operation and management of the booms, receiving their share of the profits the same as formerly (pp. 166, 173, 276, to 278 & 300 to 303 Trans.) Nothing apparently ever occurred which would in any way lead them to believe their interests were not recognized by Dean Lumber Co.

In fact those interests were recognized by Dean Lumber Co. by allowing them to continue in possession and management and to share in the profits. By reason of such possession and continued use the law would presume Dean Lumber Co. knew of their claims and acquiesced, and it is too late for Mr. Dillman to disavow it now. They were justified in assuming that whatever transfer had been made was subject to their interests.

“If one partner not in course of trade, especially if it is made under such circumstances that it practically terminates the business, and where such a transfer is made without the consent of a co-partner who is accessible at the time, it is a fraud on the latter and may be avoided by him, although it be made to a bona fide creditor of the firm. Such transaction will vest the transferee with the interest of the transferring partner only.”

30 CYC 495. See note.

These appellees were here, available, in possession of, and attending to the business of the booms, yet were not consulted (p. 166 Trans.) If it was the inten-

tion of Dean Lumber Co. to claim the whole, why was not some notice given them so they could protect their interest?

This sale to Dean Lumber Co. did not terminate the business, nor was it intended to. It continued for a number of years after with Dean Lumber Co. from about February or March 1903 to February 1907 (p. 464 Trans).

Just what was said by Mr. Merchant to Mr. Dillman and Mr. Bernitt at the time he introduced them is disputed. Whichever is correct, is not material, in view of the continued relations between the appellees and Dean Lumber Co. Mr. Dillman says Mr. Merchant used the words "new boss of Dean Company," and Mr. Bernitt (p. 166 T.) said, "Let me introduce you to your partner Mr. Bernitt."

As to what the books of Dean Lumber Co. may have shown, there is no testimony. Although Mr. Dillman says (p. 465 Trans.) they did not show Bernitt and Wittick had any claim, yet he says all of the books of Dean Lumber Co. were destroyed by the fire in San Francisco in 1906. This latter statement is somewhat peculiar. According to the witness the books of this, a going concern, saw mill and lumber business operated on Coos Bay in Coos County, Oregon, were kept in San Francisco, Calif. According to

the testimony of W. F. Squire he had charge of and kept the books up till some time in 1905, in Coos County, Oregon, as the Company's book-keeper, that the books kept by him for Dean Lumber Company were turned over to its successor, C. A. Smith, and he did not know what became of them, but part were sent to Mr. Dillman when the business was closed up (p. 275 Trans.) The business was evidently closed in 1907. Mr. Squire fixes the time in January, Mr. C. A. Smith, in February. These are both witnesses for appellants. Mr. Dillman further testified that all other books were destroyed by the witness in 1910 (p. 465 Trans.)

This suit was instituted in November 1909 (p. 17 Trans.)

Appellants insist there is nothing in the record to show that Dean Lumber Company did not account to appellees for part of the purchase price. If such a state of facts existed that was a matter of defense which the appellees should not be and are not required to anticipate. However that may be, appellants introduced the testimony of the President of the Dean Lumber Co., Mr. Dillman, and his denial of the interest claimed by appellees, certainly negatives any assumption of payment.

The statement that the whole title to

the land was conveyed to Smith, not merely the interest of E. B. Dean & Co., is not supported by the evidence. The conveyance is not introduced.

IV

The writer of appellants' brief is grossly in error at page 45 thereof relating to Mr. Bernitt's inquiry concerning the whereabouts of the old books of E. B. Dean & Co. The inquiry was evidently made after the beginning of this suit. However, Bernitt says (p. 166 Trans.) that Squire told him the books were shipped to California, experted and destroyed.

Mr. Squire testifies (p. 275 Trans.) that some of the books were shipped to Mr. Dillman after the sale to Smith, part of them turned over to Mr. Smith. This could not have been earlier than 1907. These were the books referred to, because the other books are introduced in evidence (testimony John C. Merchant, p. 130 Trans.) Again the transcript is not a verbatim copy of the testimony, and therefore, although intended to be accurate, it is incomplete, which a comparison with the testimony on file in this suit will show, at pages 114 and 115.

Mr. Dillman's recollection of what Mr. Merchant told him is evidently very much

at fault. He is the only witness appearing in the record who testifies to there being a five year lease, or any lease, to appellees, and also that they were to keep them in repair five years at their own expense. When all the other witnesses who have testified upon the subject stated that the rafters paid half the expense and the Company paid one-half. (Bernitt, p. 142, Phelan p. 270-273, Squire p. 277, Merchant p. 301 Trans).

Appellants lay great stress upon the testimony of Dillman and others, that Dean Lumber Co. did not recognize or deal with any one else as having any ownership or interest in the booms.

The facts are, Bernitt was in possession of the boom at the time Dillman first met him (p. 166 Trans.) That Dean Lumber Co. availed itself of the skill and services of appellees and they continued in the possession of the booms and their share of its net profits the same as formerly.

Phelan's testimony as to what Merchant told him is heresay, and was duly objected to on that ground.

The value of and conflicts in the testimony of the witness Kruger has already been discussed.

Instead of Bernitt testifying expressly that Mereen refused to recognize appel-

lees' claims as stated in appellants' brief, he says Mereen said with respect to their ownership that it was no way to have it, the Smith interests should have it all or none (p. 150 Trans.) Is not that expanding the elastic a little strong?

Laying aside, however, the references made by appellants to certain portions of the sayings of different witnesses, for the purpose evidently of questioning recognition of appellees' claims by appellants or Dean Lumber Co. The fact remains that appellees continued in the possession, operation and management of the booms after Dean Lumber Co. acquired its interest, enjoying its profits and sharing with that company the expenses of its maintenance, just the same as formerly for a period of about four years.

Although Mr. Squire did not remember that the question of ownership of the booms was ever discussed with Bernitt, (p. 280, 282, 283 Trans.) he admits Bernitt told him the rafters built the booms originally and they were to have exclusive use of them.

Also, with respect to the Smith companies, regardless of the fact that Powers knew of appellees' claims in the summer of 1907 (p. 148 Trans.) and Mereen knew of them in the summer of 1907 (pp. 334-335 Trans.) and the admission in their

answer at paragraph XI, p. 56 Trans. that they knew of appellees' claims in October, 1907, Mr. Powers allowed appellees to have possession and control of the booms and enjoy their profits for the rafting season beginning in the fall of 1907 and ending in the spring of 1908, just the same as formerly (p. 354 Trans).

V

As to the date of the ouster. There is no question but the testimony is not all in harmony on that point. Appellants seek to set the time as the Spring or Fall of 1908.

The testimony establishes the fact that during the rafting season in the fall of 1908 and spring of 1909, appellees continued to catch logs in the booms, make up rafts therein and tow them to the mills as formerly (Bernitt, pp. 152, 162 to 165, 225, 226, 442, 443 Trans., Wittick, pp. 176 to 178 Trans., Exhibit H, p. 362 Trans., Powers, pp. 365, 382, 459, 460 Trans., Exhibit 27, p. 227 Trans., Exhibit 15 p. 194).

The complaint alleges that since the . . day of June 1909 Smith-Powers Logging Co. has taken exclusive possession of said booms and prevented appellees from using the same or any portion thereof. The Answer does not deny this. Therefore

the date is admitted by the pleadings. The exact time, however, is not material in view of the fact that appellees continued in joint possession of the booms for the rafting season during the latter part of 1908 and fore part of 1909.

VI

Under this Point, appellants wish to require appellees to contribute several thousand dollars toward the improvements made upon the booms, without their consent, and after deducting that amount from the \$1000.00 allowed appellees, also retain the booms.

If that is appellants' idea of equity, it explains why appellees must seek a court of equity for relief.

Yet, to answer this from appellants' point of view, how is it possible for a Court to determine the amount appellees should contribute? The only evidence before the Court is Exhibit "C" (pp. 305 to 317 Trans.) covering a period of time from Sept. 20, 1907 to long after Jan. 1st, 1910, and showing a total expenditure of over \$31,450.00. The items are described in such a manner that no court could segregate them, and even if it could, would it be just to make them contribute hundreds of dollars for improvements and then allow them to be confiscated at the whim of

appellants. Undoubtedly the Court made a liberal allowance for all of this in fixing the value of appellees interest in the booms as low as \$1000.00.

The testimony shows that the original cost of these improvements was not less than \$7500.00 (p. 167 Trans.) It is true some of the testimony would tend to show they were showing age in places. Yet it seemed to fill the bill until appellants desired to appropriate them. Four or five hundred dollars were spent on them every year prior to that time (p. 156 Trans.) and they were used each year.

Appellants also introduced, over appellees' objection, Exhibit "D" (pp. 319, 320, 321 Trans.) which they possibly may insist would be sufficient for the Court to act upon in determining such an amount.

In that statement for the year 1907-1908 the total expense was \$1350.47 of which one item, \$644.20, was for interest alone.

There is no evidence to explain it. Why was it necessary for appellees to pay interest? Their shares in the booms were not in debt. The same objection applies to that part of it covering 1909, and further that it covers the whole of that year when it should not go beyond June 1909.

If appellants were entitled to any credit upon that account, they should have

played fair. They have repeatedly refused to furnish a statement of the expenditures to appellees, (p. 161 Trans.) and failed to introduce one in testimony showing the items of expenditure necessary to keep the booms in repair. Therefore, even if their contention was correct, in theory, by their line of conduct they have placed themselves in a position where they are not entitled to any consideration upon that point. But there is no question but the Court made due allowance for this in fixing the price at \$1,000.00.

LEGALITY OF BOOMS

This testimony shows that these booms were constructed between the years 1881 and 1887 (pp. 135-139 Trans.) This was prior to any legislation making their construction illegal. So far as these appellees and their predecessors are concerned, their rights became vested upon the completion of their portion of the agreement, that is by their contribution to the construction of one-half of the booms. If any portion of these booms were so constructed subsequent to the law, that is a question for the owners of the booms and boom rights to settle with the government of the United States.

The authorities cited by the appellants

have no bearing upon this case. That the appellees could not acquire any rights in the lands under this agreement because some parts of the boom might be illegally constructed is manifestly absurd. Yet though such a rule could be made to apply, these rights became vested long prior to the enactment of any law making the construction of booms illegal.

Appellants cite the rule given in *Cyc* to the effect that there can be no prescriptive right to maintain or continue a material obstruction to navigation.

Appellees are not claiming that they acquired any rights by prescription. Their claim is based on contract, and the point in question is as to their right to maintain and operate the booms upon the lands of the appellants in accordance with the original agreement under which they built the booms.

PROCURING GOVERNMENT PER- MITS

It seems from the evidence that C. A. Smith and the Smith-Powers Logging Company have procured permits from the Government for the maintenance, construction and operation of booms upon the lands in the complaint mentioned, and other lands. By reason of this they

sought to overcome the appellees' claim of right to use the property. That, however, does not avail them, because

“One tenant in common will not be permitted to inequitably acquire title to the common property, solely for his own benefit or to the exclusion of his co-tenants.”

“The general rule being that the purchase or extinguishment of an outstanding title to encumbrance upon, or claim against the common property by one tenant in common inures to the benefit of all the co-owners who may within a reasonable time elect to avail themselves of the purchase of the outstanding interest or conflicting claim, or removal of the encumbrance from the common property.”

38 CYC 40, 41-42

Crawford vs. O'Connell, 39 Or. 153, 64 Pac. 656.

Dray vs. Dray, 21 Ore. 59, 27 Pac. 223.

Also see

Bohlman vs. Coffin, 4th Or. 317.

IN CONCLUSION

The main question in this case is whether Smith had notice or was bound to take notice of appellees' claims at the time of the purchase.

Appellees were in actual possession at the time the transfer took place, February 1907 (Smith, pp. 219 and 222 Trans., Bernitt pp. 146 & 449 Trans).

Smith did not examine the boom nor have it examined to see if it was in the possession of anyone (p. 223 Trans). And he and appellants would have the Court believe that he knew nothing of appellees, when the established facts are that they were not only in possession of the booms, but sharing with him as successor of Dean Lumber Co., its earnings. In addition to this, the book accounts covering these booms were evidently examined by him or his agents. Squire testifies that the books were turned over to Smith (p. 275 Trans.)

The appellees claimed the right of one-half of all boomage earned by the booms up to such time as an accounting was made. The Court allowed them upon what it could determine was the earnings up to the end of the 1908-1909 logging season, sometime about June 1st, 1909.

Exhibit 15 gives the exact footage on

the Simpson Lumber Co. logs, Exhibit 27, the footage of the Gould logs. And as to the other logs the amount is given in Bernitt's testimony on page 231 of the transcript, and at other pages therein. These amounts are not controverted but stand proven. Apparently the only contention of appellant is that appellees were not entitled to any amount. This is the evidence which the Court accepted as establishing the amount of timber on which appellees should recover.

With reference to the identification of the account books, Exhibits 1 to 7 inclusive, and 18 to 23 inclusive, the witness W. T. Merchant identifies these as the books of E. B. Dean & Co. at the time each is offered in evidence and states that the bookkeepers who made the entries are dead (p. 124 Trans.) He identifies some of the entries in the books to be in the handwriting of his father (p. 130 Trans.) C. H. Merchant, one of the partners of E. B. Dean & Co. which consisted of E. B. Dean, David Wilcox and C. H. Merchant (pp. 116, 117, 120 Trans.).

The persons who acted as book-keepers and kept these books were: C. H. Merchant (p. 116,) Webster (p. 119 Trans.), F. M. Phipps (p. 120 Trans.), Sam Dean (p. 125), Mr. Bischoff (p. 127). Witnesses identified their writing (pp. 117, 119,

129, 120, 127, 130, 204 Trans). W. T. Merchant (p. 129, 204 to 215 Inc.) also again identifies the books.

The witness John C. Merchant identifies the books Exhibit 1 to 7 inclusive, as the account books of E. B. Dean & Co., and states they were in the back office of E. B. Dean & Company during the time his father, C. H. Merchant, was receiver (p. 130) and stated that he worked for his father while he was Receiver for E. B. Dean & Co. and had occasion to look over the books a number of times. That he had secured the books from the old warehouse of E. B. Dean & Company, three years prior to his testifying.

The appellees believe that the law, equities and evidence in this case fully sustain the decree against appellants.

Respectfully submitted,

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JOHN F. HALL,
Attorneys for Appellees.

No. 2591.

United States Circuit Court
of Appeals
For the Ninth District

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COMPANY, a corporation,
and C. A. SMITH LUMBER
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Reply
APPELLANT'S BRIEF

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APPELLANT'S BRIEF

The questions arising on this appeal are almost entirely questions of fact. The law is well settled and easily applied. As we view it the following material questions arise for the consideration of this court on appeal:

1. Did appellees sustain their burden of showing that the original agreement made the raftsmen joint owners or co-tenants with E. B. Dean & Co. in the real property involved in this suit?
2. Did appellees sustain their burden of showing that the original agreement gave the raftsmen any IRREVOCABLE right, license or easement?
3. If they have sustained that burden was such an agreement valid in view of the Oregon Statute of Frauds requiring an agreement not to be performed within one year to be in writing, and requiring any agreement for the leasing of a longer period than one year, of real property, or for the sale of real property or any interest therein, to be in writing?
4. If they have sustained that burden and the agreement was not within the Statute of Frauds, was not C. A. Smith a subsequent purchaser in good faith and for a valuable consideration of the same real property, and entitled to the protection afforded him by Section 7129 of Lord's Oregon Laws, requiring conveyances of real property to be recorded?
5. If they have sustained that burden and the agreement was not within the Statute of Frauds, and C. A. Smith is not entitled to

the protection of the recording act, *were appellees ousted of possession in 1908 or 1909?*

6. If they have sustained that burden and neither the Statute of Frauds nor the recording act apply, were or were not appellants entitled to contribution from appellees for their share of repairing the boom in accordance with the United States government's requirements?

An examination of appellee's brief discloses that the theory on which the suit was brought and tried, as shown by the allegations of the complaint, and the proofs adduced in support thereof, has been wholly abandoned by appellees and an entirely new theory adopted on this appeal.

The complaint is clearly founded on *a co-partnership agreement and joint ownership*.

Paragraph IV of the complaint (T. p. 3) alleges that the parties entered into a "partnership agreement." Paragraph V begins with the words "That in pursuance of said co-partnership agreement." Paragraph VI begins "That under the said partnership agreement." The same theory appears throughout the complaint and particularly in paragraph XXIV (p. 13) which begins as follows:

"That under and by virtue of said *partnership agreement* and by virtue of their *joint ownership* these plaintiffs are each entitled," etc.

But on this appeal this theory seems entirely abandoned for the opening paragraph of the so-called "statement of the case" in appellee's brief asserts that:

"This is a suit in equity between *tenants in common*."

Where, how, or when the relationship of tenants in common arose is not pointed out, but that they were tenants in common seems to be a fact necessary to assert because the brief contains many cases applicable to tenants in common. Volumes have been written on the distinction between joint tenancy and tenancy in common, but it is futile to submit authorities for at page 17 of appellees brief we find that appellees are neither joint owners or tenants in common, being there asserted:

"So far as the ownership or the legal title to the land itself, these appellees make no claim except as to the *easement, the right, privilege or license*," etc.

Then again at page 38 of the brief appellees state that:

"While the original undertaking was unquestionably that of a partnership, the changes subsequently made in the ownership of the different fractional parts of the whole render it somewhat confusing as to how long it continued to exist, and where the doctrine of co-ownership and tenants in common should be applied."

We frankly confess that we find it more than "somewhat confusing" to follow the various and conflicting theories appellees advance. It is always more or less confusing to endeavor to erect a substantial and imposing edifice on a foundation of shifting sand. The trouble with appellees case is that it is impossible to point out in the record any testimony that establishes a starting point for a line of reasoning which logically followed out would reach the desired point. There is nothing to tie to. Taking the view of the testimony most favorable to appellees we must necessarily start with a violent presumption, i. e., that the arrangements between the original parties was such as to give the raftsmen a part ownership of the real property, or to give them an irrevocable license or easement, or some similar rights, and then by the process of reasoning in a circle find that they are entitled to recover for the value of such rights. The court below hurdles all these apparently troublesome questions by saying that it is unnecessary to determine what the rights of appellees are, then finding that they have rights and then awarding damages; and counsel for appellees attempt to take the same short cut. This may be the easiest way to dispose of a troublesome case, but it is not law and it is not equity. The appellees were the plaintiffs below and on them devolves the burden of establishing that they acquired and still retain clearly defined rights of a kind and in a method recognized by law.

That we must start with this violent presumption

is shown, not only by the testimony and proven facts, but by the statement thereof in the second and third paragraphs of appellees brief. In order to fix a starting point for this court on appeal let us examine the facts concerning the *original arrangement* as stated in this portion of appellees brief. This statement of facts, which we quote from their brief (*italics ours*) is as follows:

“That in 1881 E. B. Dean, David Wilcox and C. H. Merchant were carrying on and conducting a sawmill business upon Coos Bay, in Oregon, under the firm name of E. B. Dean & Co.; that they desired to made *certain arrangements* with men carrying on rafting business so that the logs for their sawmills coming down on the waters of the various tributaries of Coos Bay could be properly and economically handled; that George Wulff and David Young were in the business of rafting logs, and William Klahn and E. W. Bernitt were also in the same business; that pursuant to this idea C. H. Merchant, one of the partners, induced George Wulff and David Young *to contribute to the construction of certain log booms*, in the complaint described, for the catching of these saw logs and timber; that the land for the most part upon which these booms were constructed belonged to the partnership of E. B. Dean & Co.; that C. H. Merchant also tried to induce William Klahn and

E. W. Bernitt to go into the business with them, but at first they hesitated and E. B. Dean & Co., together with George Wulff and David Young, commenced the construction of what is described in the testimony as the Upper Boom; that before said Upper Boom was completed however, William Klahn and E. W. Bernitt consented and did go in and *became interested in the enterprise*; that E. B. Dean & Co. was to, and did, furnish the land and one-half of the cost of building the booms, and the other parties were to, and did, pay for half of the construction of the booms, and were to, and did, operate and take care of them; that E. B. Dean & Co. was to, and did, pay 25 cents per thousand feet board measure, for saw logs and 1-8th of a cent per lineal foot for piles, for its own timber caught and handled through the boom, and the boom was also used to catch the saw logs and timber of other parties at the same price.

“That the following method of handling the business was adopted: The logs and timber caught in the boom for Dean & Company were credited to a Boom Account kept by E. B. Dean & Co. on its books, and the cost of keeping up the boom, such as labor and material for repairing it was charged to this account. Ordinarily at the end of each rafting

season a balance would be struck and if the upkeep of the boom had not consumed the entire earnings of the boom for logs caught belonging to E. B. Dean & Co., the difference was divided among these *parties*, one-half was retained by E. B. Dean & Company, and one-half was placed to the credit of the rafters on their individual accounts on the books of E. B. Dean & Co. If the earnings of the boom from the logs and timber caught for E. B. Dean & Co. were not sufficient to pay for the upkeep of the boom, the deficiency was charged, one-half to E. B. Dean & Co., and one-half to the rafters, who at the beginning of the agreement were George Wulff, David Young, William Klahn and E. W. Bernitt; that the earnings of the boom from other logs and timber caught therein for outside parties were divided, E. B. Dean & Co. taking one-half and the rafters taking the other half, divided in proportion to their respective portions. *This was the original agreement.*" (Appellees Brief pages 2, 3 and 4.)

This, then, is the foundation on which appellees *must* build their case. This was the original agreement. Let us examine it carefully. It will be noted that there is not a word as to the *rafters* being entitled to any ownership in the property itself. There is nothing said about their becoming joint tenants or tenants in common. There is nothing said about

their becoming partners. There is nothing said about their having any *easement* or *irrevocable* license or rights, for the duration of the arrangements is not even attempted to be stated. Here is where we must indulge in our presumption. We must presume these essentials of appellees' case. We must presume that the rights of the rafters were irrevocable, that they were to continue "for all time," and in passing, if we presume this, the agreement would be void under the Oregon statute as pointed out in our main brief (page 26, 27). We must presume that the agreement was that the rafters were to become part owners of the real property, for the boom was a permanent improvement on land, and clearly was itself real property in the absence of an express agreement that it was to remain personal property. Here again, if we presume that the agreement operated to convey ownership in real property to the rafters, then it was void as to subsequent purchasers. (Appellants' brief, pp. 26 and 27.)

One who has the burden of proving the terms of a contract cannot ask the court to assume that the minds of the parties met on the very elements essential to make out his case. Appellees' case should stand or fall on the original agreement *as proven*.

A considerable portion of appellees' brief is devoted to a discussion of the various transfers between the different sets of raftsmen. These were all made without the knowledge or consent of the other raftsmen, and each one transferred whatever interest he

thought or claimed he had. Counsel for appellees seek to add to the original agreement by showing that some of these transfers attempted to convey an interest in the property itself. For instance at page 20 of appellees' brief attention is called to the bill of sale from Klahn to plaintiff, Bernitt, both of whom were parties to the original agreement. Counsel for appellees then say:

“That this instrument clearly sets forth the understanding of these partners, of their respective interests, at a time when the matter was fresh in the minds and memories of all parties concerned, can hardly be controverted. It is not conceivable that Klahn and Bernitt would have that understanding, without all the parties knowing just what they claimed. E. W. Bernitt has continued all these years to hold and claim his interest in those booms *in conformity with that understanding expressed in the Bill of Sale.* (Exhibit No. 8.)

Need we point out the absurdity of such argument; that appellees are not claiming under any understanding between Klahn and Bernitt; that any understanding between them is not binding on the other parties to the original agreement? Clearly if Bernitt claims his interest by virtue of that bill of sale, as stated by appellees' counsel, his case must fall. On the other hand if he rests his case on the original agreement between all the parties he cannot add to that agreement by any private agreement with Klahn. The

same rule applies to all the transfers between the raftsmen. And why is it necessary for appellees to rely on this bill of sale to show that the original parties to the agreement had some interest in the property itself? Bernitt was present and testified at the trial. Why did not he testify to that effect? That he did not so testify is shown in our main brief at pages 30, et seq. Nor did Wulff, the only other one of the original parties who testified at the trial. On the contrary Wulff's testimony clearly negatives the claims now made by appellees. In the face of the testimony of Bernitt and Wulff counsel for appellees are forced to bolster up their case by relying on title derived from the subsequent transfers between the individual raftsmen, of which transfers the other raftsmen and E. B. Dean & Co., the actual owners of the property, had no knowledge. Like the hen trying to hatch out houses and lots from a setting of door knobs, counsel for appellees seek to incubate from these bills of sale rights of ownership in the real property of E. B. Dean & Co. They don't know what breed they are, whether they are rights of joint tenants, tenants in common, partners, owners of an easement, or irrevocable licenses, but they are satisfied they must be some kind of rights of ownership in real property.

Their case is also attempted to be aided by what amounts to testimony by appellees' counsel throughout their brief. For instance, at page 10 of their brief they say:

“The understanding being that E. B. Dean

& Co was to furnish the land and pay one half of the cost of the construction of the boom, and said Wulff and Young the other half, *and each was to have a half interest therein.*”

But no reference is made to the testimony supporting this statement of one of the vital points of the case, and we challenge counsel for appellees to point out any such evidence. Nor is there anything in the record to support the statement at page 17 of appellees’ brief, that

“The testimony and record thus far outlines and *establishes the fact* that there was a partnership or at least *joint ownership* of these booms in the beginning, and this testimony has in no manner been controverted by the appellants.”

We unqualifiedly assert that there is no evidence, competent or otherwise, in the record to support this statement. *The fact, if it be a fact, that the rafters were charged on the books of E. B. Dean & Co. with a part of the cost of construction of the boom, does not prove that the rafters were joint owners or co-tenants with E. B. Dean & Co.* They might have been, and probably were, willing to bear a part of the cost of construction in return for the rafting and booming privileges, whatever they were, which they were to enjoy. What the arrangement really was is not to be presumed but proven by appellees and this they have wholly failed to do.

We respectfully submit, therefore, that questions numbered "1" and "2" at the beginning of this reply brief, should be answered in the negative.

Questions "3" and "4" as to the effect of the statute of frauds and the recording act, have been fully covered in our main brief at pages 25 to 29 inclusive.

The next vital matter to be considered is that covered by question numbered "5" as follows:

"If they have sustained that burden and the agreement was not within the Statute of Frauds, and C. A. Smith is not entitled to the protection of the recording act, *were appellees ousted of possession in 1908 or 1909?*"

In our main brief, pages 70 to 74 inclusive, we analyzed the testimony on this point, and pointed out that by the testimony of the appellee Bernitt himself, the appellees, if ever ousted, were ousted in 1908. We also pointed out the other evidence showing that the Smith-Powers Company was in exclusive possession after 1908; that Willis Varney on behalf of that company took possession in July, 1908, and continued until Christmas, 1908, when he turned over possession to W. J. Ingram.

In appellees' brief, however, it is repeatedly asserted that appellees were not ousted until the spring of 1909, but no reference is made, and none could be made, to evidence in the record supporting this assertion. What is ouster?

"Ouster is not necessarily a physical eviction. It may exist if there be ~~an~~ possession of

or under the adverse claimant, attended with such circumstances as to evidence a claim of exclusive right and title.”

38 Cyc. 25, and cases cited.

Here we have exclusive possession by the Smith-Powers Company in July, 1908, and after that time, and a claim by them made in a statement to Bernitt by Bernitt's own testimony that they claimed exclusive right. All the elements of ouster are here proven by one of the appellees himself, as well as by appellants' witnesses, and none of this is controverted.

If appellees were ever ousted, in was in 1908 and not in 1909 as found by the court below and asserted by counsel for appellees.

In their brief appellees assert, as did the court below, that the complaint alleged the date of ouster to be in June, 1909, and that the answer does not deny this. The answer did deny this. It alleged (paragraph 9, Tr. p. 54) that C. A. Smith and Smith-Powers Logging Company purchased the property in July, 1907, and at that time entered into the possession thereof and ever since have been in the *open, continued and exclusive control* thereof, and the answer further alleges (Tr. p. 58) that the plaintiffs *were permitted to operate the boom until the fifteenth day of October, 1908, at which time the defendants informed the plaintiffs that thereafter the Smith-Powers Logging Company would take exclusive charge of said boom and premises.* Clearly, the position taken by the court below and by counsel for

appellees in their brief, that the answer admitted the date of ouster to be June, 1909, is untenable, for the answer expressly set forth exclusive possession after July, 1907, and exclusive possession *and operation* after October, 1908, under a claim of right to do so, which claim was communicated to appellees at that time.

Appellees cite several cases to support the proposition that the relationship between E. B. Dean & Co. and the rafters was that of partners. In our main brief we endeavored to show that the evidence did not support this contention. In addition we wish to submit that the cases defining partnership are usually cases where it is necessary for the court to determine the question as fixing liability to *third persons*. That question does not arise in this case. Counsel for appellees treat the question as an abstract proposition of law and no doubt if we were simply trying to define "partnership" the cases cited would be in point. In the case at bar, however, appellees are claiming as co-partners or co-tenants with appellants, and base their claims on an oral agreement. When the question of rights and liabilities arise *inter sese*, as in this case, mere definitions of partnership have no particular bearing. The vital questions to be determined are: *What was the contract between these parties and did that agreement contemplate that appellees were to be part owners of the property itself? Was it a mere working arrangement to operate the boom*

on a profit sharing basis? How long was the arrangement to continue? Was there any irrevocable right, license or easement granted?

After citing these cases appellees' counsel apparently concede that the relationship was not that of co-partners, although that is the theory set forth in the complaint, for at page 41 of their brief they say:

“While the appellees and the corporation Smith-Powers Logging Company may not be partners, yet under appellees' claim of ownership they are at least co-owners.

But on what basis does their “claim of ownership” rest? They are not co-owners because they claim ownership.

And on pages 42 and 43 of their brief we find still another theory advanced:

“The appellees' theory of the case is this. Although there may not have been any agreement that the land itself should become partnership property, or that appellees or their predecessors were to acquire any legal title thereto, yet by reason of their entering upon the land at the solicitation of the members of the firm of E. B. Dean & Company, the owners, and making valuable and permanent improvements thereon with their knowledge and consent, and joint participation, that was sufficient to give them a right, license or easement in the land to continue to use and occupy the same with their boom and maintain it and

enjoy the fruits, and share in their proper proportion with the other co-owners or partners."

Here, it will be noticed, appellees frankly abandon all claim of rights based on a contract of partnership or otherwise, and rely on the fact that the raftsmen were charged on the books of E. B. Dean & Co., with a part of the cost of construction of the boom. Compare this theory with the allegations of the complaint. The system of preparing appellees' brief seems to have been to first find an imposing array of authorities, then to endeavor to distort the facts in this case to fit those cases, then to find another line of cases, more distortion, and so on to Q. E. D.

Now this is not a simple case of the raftsmen going on the property of E. B. Dean & Co. and erecting valuable and permanent improvements thereon. There was an agreement of some kind by which a boom was constructed and a portion of the cost of construction charged to the raftsmen, in return for which they were given a valuable privilege. That much may be considered as proven and that much only. As we said at the outset of this reply brief, appellees have wholly failed to sustain the burden of proof as to the terms of that agreement. The major part of plaintiff's foundation is a fabric of presumptions, intended to shift under the weight of each line of authorities which plaintiffs seek to have it sustain. It is therefore futile to endeavor to distinguish the authorities cited by appellees. The real

questions involved in this case are largely questions of fact and not of law.

Appellees brief goes on to say (p. 43):

“As to whether they were partners with E. B. Dean & Co., or that firm’s successors and assigns *is not material, because whatever* rights they may have had became vested and were acquiesced in and E. B. Dean & Company, through their *authorized* Receiver, and the Dean Lumber Company.”

Here is still another theory, that of rights of ownership based on recognition and acquiescence by C. H. Merchant, as Receiver of E. B. Dean & Co., and by the Dean Lumber Company. Cases are cited which apparently fit that theory but the facts of this case do not. Let us re-examine these facts briefly. C. H. Merchant, one of the original “partners,” was receiver for E. B. Dean & Co. He, as receiver, sold to Mr. Dillman, representing the Dean Lumber Company, all the property in question, including the boom itself. Appellees and their predecessors allowed the legal title, if they had any say in the matter, to rest in E. B. Dean & Co. and in C. H. Merchant as receiver. Merchant as receiver showed Dillman over the property, told him it was the property formerly belonging to E. B. Dean & Co.; that he had title to it as receiver; that the raftsmen had leased it for five years, and that they were to pay a certain rental according to the amount of logs they sent through. This is far from being a recognition of the

rights of ownership of appellees. Merchant, as receiver, sold the entire property to the Dean Lumber Company, and that company clearly not only did not recognize any rights of ownership in the raftsmen but expressly repudiated any such claims. All of the testimony in the record is analyzed, with proper references to the printed record as required by the rules of this court, in our main brief, pages 44 to 69, and shows conclusively that the alleged rights of ownership *were never recognized*, and yet counsel for appellees dispose of this overwhelming evidence with the brief assertion that the rights of ownership of the raftsmen were recognized and were acquiesced in by E. B. Dean & Co., through their "authorized" receiver, and the Dean Lumber Company.

Having satisfied themselves that appellees must have some rights of ownership, counsel for appellees next advance the proposition that C. A. Smith was not an innocent purchaser because the raftsmen were in possession of the boom at the time he purchased it. Before leaning too strongly on this prop it would seem to be incumbent on them to establish that the raftsmen were in possession. As we have seen, the Dean Lumber Company purchased the property from the "authorized receiver" of E. B. Dean & Co. The Dean Lumber Company expressly refused to recognize the rights of ownership claimed by the raftsmen, put permitted them to operate the boom and carry on their rafting business. That is to say, they did continue to carry on their rafting business;

the Dean Lumber Company had no control over that part of it. Anyone could or can tow rafts about the bay subject only to laws governing same. Now the raftsmen clearly were not in possession as owners of the boom at any time while it was owned by the Dean Lumber Company. Such "possession" as they may have had was that of workmen only, the same kind of possession a house painter would have of a vacant house he was painting for the owner. The arrangement under which they had "possession" was as stated by the witness Squires and others, a working arrangement only, and the Dean Lumber Company expressly refused to recognize any rights of ownership. (See appellant's brief, pp. 45, et seq.) No case is or can be cited to sustain the contention that such possession as this can defeat the title of an innocent purchaser for a valuable consideration.

At page 67 of their brief, appellees cite the following text from Cyc.

"A tenant in common cannot enforce contribution if he asserts ownership of the entire title as against his co-tenants."

We quite agree with this statement of the law so far as it goes. Appellees counsel have forgotten to add the text appearing on the next page, as follows:

"Conversely, if he is to be called upon for an accounting of the rents and profits, he is to be allowed for advances properly and reasonably made by him for repairs and improvements."

38 Cyc 59.

The position taken by counsel for appellees is most inequitable and inconsistent. They assert, and, as we have seen, it is but a bare assertion, that the date of ouster was June, 1909, and the court below allows them to share in the profits for the logging season of the winter of 1908-1909. Mr. Powers said to them in the fall of 1908:

“I tell you right here that you haven’t anything more to do over there” and “said that they had no interest in the booms.” (Bernitt’s testimony, Tr. pp. 151-152.)

and the Smith Powers Logging Company was then in actual possession of the boom (Ingram’s testimony, Tr. p. 233; Varney’s testimony, Tr. p. 260). Our position is that at this time, in 1908, there was a complete ouster, if ever.

“Ouster may be proven by a claim of exclusive right accompanying possession, as where the adverse character of the possession of the one is actually known to the others.

38 Cyc. 32-33.

Now if we took this position and tried to enforce contributions after such an ouster, we would not be permitted to do so, but if there was no claim “of the entire title” at that time, and if there was no ouster at that time, as is held by the court below and maintained by counsel for appellees, then the court which says there was no such claim and no such ouster should compel appellees to contribute for the winter of 1908-1909, that is, up to the time when the court

holds there was an ouster. They cannot claim in one breath that appellants asserted "ownership of the entire title" and therefore are not entitled to contribution, and in the next breath assert that there was no ouster until some imaginary date in 1909, and claim a share of the profits up to that time.

At page 74 of appellees' brief, they apparently concede the correctness of the rule of law relied on in our main brief, that if a partnership ever existed, the appellees ratified the sale by Merchant, as receiver, to the Dean Lumber Company, and cannot now question the subsequent transfers. They say, however, that the rule does not apply in this case because there is no evidence that appellees knew when the sale to Dean Lumber Company was being made or was made until after conveyance passed. There is plenty of testimony in the record to show that they knew of the sale at or about the time it was made (Appellants' brief 37 to 43) Bernitt testified that he told Mr. Squires, manager for Dean Lumber Company, that if he had E. B. Dean & Co.'s old books, "he could prove their claims to the booms." (Tr. p. 166). The Dean Lumber Company was the owner of the property from 1903 to 1907, (Tr. p. 464) yet during all that period of four years the appellees acquiesced in the sale to the Dean Lumber Company, at least they took no steps to question it. Does not their conduct amount to a ratification of the sale by the "authorized receiver" to the Dean Lumber Company?

*But that was not the opportune moment to make their claims. At that time "the boom wasn't kept up, was depreciating all the time, getting a little worse and a little worse, and not only on account of the boomsticks rotting out faster than they were replaced, and the chains, but the boom itself was filling up rapidly on account of drift. (Tr. p. 271) Bernitt talked these matters over with Squire the manager for the Dean Lumber Company, "there was apparently a crisis coming as to whether they could use the booms at all or not and they were being forced by other parties who were kicking, that the booms occupied the channel and there seemed to be no permit from the Government; that they seemd to be using it by common consent and frequently people were objecting because the channel was being blocked, and they were interfering with the boom; ***** they didn't suppose they could obtain a permit from the Government to use the booms that way." (Tr. p. 278).*

When Mr. Smith bought the boom "*of course it had seen its day at that time.*" (Tr. p. 282.) It is apparent that it was hardly worth while to make any claims of ownership in the boom at that time, even had any such rights existed. It was much better to stand by and allow the Smith-Powers Logging Company to expend thousands of dollars in repairs and extensions, get the absolutely necessary Government permits, and put the boom in condition to handle

logs, and then make their claims of ownership. It is obvious that the boom itself was practically worthless when it was taken over by Mr. Smith and the Smith-Powers Logging Company. The chief value was in the *tide lands* on which the boom was constructed. Appellees admit in their brief that they have no ownership of the lands themselves. But the court below found that the booms were worth \$2,000 and said that little value could be attached to the tidelands, the valuation of \$2000. being apparently arrived at by taking the amount the Logging Company paid (Tr. p. 82) for the boom *and the tide lands*. It appears from the complaint itself that these tidelands consisted of 21.62 acres. (Tr. p. 4.) The testimony abundantly shows the market value of these and similar lands. For lands immediately adjoining these lands, the logging company paid \$50. an acre, which was a very reasonable price; adjacent lands of the same character had sold for \$100. an acre; (Tr. p. 352); the company paid \$2500. for Holland Island, consisting of about 20 acres (Tr. p. 389). So that the lowest price for which any similar lands sold was \$50. per acre. It would seem therefore that this was a reasonable valuation to place on the 21.62 acres mentioned in the complaint, and at \$50. an acre this would amount to \$1081. Deducting this from the sum of \$2000, would leave the value of the boom itself \$919. and appellees alleged half-interest would be \$459.50. Furthermore, the court below found that the general Government required the booms to

be so changed in part as to leave a portion of the channel of Coos River open and free to navigation. "This requirement imposed a large amount of expense for reconstruction (Tr. p. 82). So that even if we jump to the conclusion that appellees owned a one-half interest in the boom, and that is the only way one can reach such a conclusion, the record is clear that the boom itself, excluding the tidelands, was worth less than nothing, because it was in a dilapidated condition, had "seen its day," and had to be re-constructed at great expense to meet the government requirements or its use discontinued. Yet the appellees are awarded the sum of \$1000 as the value of a half interest in the boom.

It is argued at pages 84 and 85 of appellees' brief that the rule cited by us that there can be no prescriptive right to maintain or continue a material obstruction to navigation does not apply for the reason that appellees are not claiming under a prescriptive right but under a contract. Perhaps we should have explained more fully that our conception of the rule is that there can be no vested rights, such as claimed by appellees, which will permit anyone to obstruct the navigable waters of the United States contrary to United States laws, and for that reason alone *the boom was practically valueless until reconstructed at large expense*. In passing, it is interesting to note that so near the close of their brief (page 85) appellees state that their claim is "*based on contract.*" As for the authorities cited on page 86 of their brief

we are at a loss to follow the reasoning or understand just what they are driving at, unless it be that they are trying to prove that the Smith-Powers Logging Company, having gone ahead and obtained the necessary permits from the Government and reconstructed the boom in accordance with the government requirements, should share with the raftsmen the benefits and profits without asking them to shoulder a share of the burden.

And appellees say "in conclusion" at page 87 of their brief that:

"The main question in this case is whether Smith had notice or was bound to take notice of appellees' claims at the time of the purchase."

They then assert that appellees were in actual possession at the time the transfer took place, February, 1907, and refer to Smith's testimony at pages 219 and 222 of the record and to Bernitt's testimony at pages 146 and 449. Let us examine this "main question" and the testimony referred to. Smith testified at page 219 that he purchased the boom in February, 1907, from Mr. Dillman, representing the Dean Lumber Company, the bargain being made in Sacramento, that he had previously seen the boom as he passed by in a launch and that was the only knowledge he had of the boom except the statement of Mr. Dillman that they had a boom there which they had maintained for many years and that it was part of the assets of the Dean Lumber Company; that wit-

ness understood at the time of the purchase that the Dean Lumber Company was the absolute owner of the boom the same as it was of all the other property which they sold and deeded to him. And at page 222 he testified that when he passed by the booms in a launch some two months before he purchased them he did not notice anyone working at the booms or whether there were any logs in them. Now what is there in this testimony to show that Mr. Smith "had notice or was bound to take notice of appellees claims" or that "appellees were in actual possession?"

Bernitt testified at page 146, referred to by appellees, that "the plaintiffs had possession of the boom up to the spring of 1908 and *considered* that they owned a half interest in it, and considered that it was theirs yet." Now it is manifest that this is a mere conclusion of the witness. The kind of possession we are considering and the kind appellees must prove is not to be established by the bare assertion of Bernitt. The fact that he "considered" they had a half interest has no probative force whatsoever. He further testifies that the plaintiffs kept the boom in repair, operated it, etc. and were rafting logs in 1906 and 1907 and were at the boom rafting logs the entire month of February, 1907, "*that is making up rafts and towing them away.*" We concede all this; we concede that the raftsmen were rafting about the boom during these periods; we concede that they operated the boom; but they were doing so under a

working arrangement such as testified to by Squire, Dillman, Phelan, W. T. Merchant and others who were in control and management of the Dean Lumber Company at that time. W. T. Merchant was one of the plaintiffs' own witnesses; he was a son of C. H. Merchant, the "authorized receiver" of E. B. Dean & Co. Merchant testified that he was manager of the Dean Lumber Company for four years and had charge of its entire business on the Bay, including the charge and control of the boom, and:

"That during that time he did not recognize or deal with any one else as having any ownership or interest in these booms. That there was no question but that he would have known of it if the Dean Lumber Company had so dealt, and he did not know of its doing so; that he never understood that there was any understanding as partners between Bernitt and the Dean Lumber Company." (Tr. p. 300)

Mr. Dillman, president of the Dean Lumber Company, testified:

"That the first he heard of any claim by the plaintiffs was after the property was sold to Mr. Smith; that absolute ownership was claimed by the Dean Lumber Company, and no one else had title to it as far as the witness knew." (Tr. p. 465.)

To the same effect see the evidence on this subject collected and analyzed at pages 44 to 54 of appellants' brief. This was the kind of "possession" the

plaintiffs had, that of raftsmen working around the boom and operating it, but not under any claim of ownership. The other testimony of Bernitt cited by appellees, at page 449, makes no better showing. The utmost that can be said of this testimony is that it shows the raftsmen were working in and around the boom. The question which naturally presents itself is—Why did not Bernitt or Wittick, or some other witness testify to facts tending to show that appellees had possession under a claim of ownership, or at least part ownership? The answer is obvious.

At the argument the question arose as to why the plaintiffs continued to work around the booms after they were told in 1908 by Mr. Powers that their claims would not be recognized, and counsel for appellees earnestly insisted that they were endeavoring in good faith to carry out their contract. What was going on at the boom from August, 1908 up to Christmas, 1908? Willis Varney was in charge of the boom during that period; "that during that time they were engaged in building new booms and repairing the old ones;" (Tr. p. 260) "that during that summer and fall he built a new boom from the head of the Cut-off to the foot of the Old Boom splitting the channel" (Tr. p. 260). We understand that the alleged contract which plaintiffs were endeavoring in good faith to carry out at the time required plaintiffs to bear half the labor and expense of repairing the boom. Were they endeavoring in good faith to comply with that provision of their alleged contract? If

so, where in the record have they established that fact? And after Christmas, 1908, when Ingram was in charge for the Smith-Powers Logging Company, did the plaintiffs endeavor in good faith to assist in the repairs? Ingram says they did not. He says he was there during all the rafting season of 1908-1909; that Mr. Bernitt and Mr. Wittick

“didn’t aid in repairing the boom, but did help make up rafts occasionally and tow them away to North Bend or Marshfield whenever the occasion offered; that in some places it is customary for the raftsmen engaged in towing to help make up the rafts and in some places not; that some of the raftsmen aided here and some did not, but that it is customary for them to help; that the plaintiffs did some work making up rafts but didn’t open the sheers or open the booms, or do anything of that kind to witness’ recollection excepting that he saw Mr. Bernitt closing the sheer boom one time when the witness was working above.” (Tr. p. 237.)

That is what the plaintiffs were doing at the boom during the logging season of 1908-1909. They were rafting the same as were other raftsmen. They were not endeavoring in good faith to comply with their alleged contract in any of its terms.

We all know that long and intimate association with an article of property easily germinates the idea of ownership. Bernitt and Wittick had rafted

around this boom for many years, part of the time we concede they were operating it under a working agreement of some kind. Let us give them the benefit of the doubt and say that the rafters did not intend to become grafters, but sincerely believed from their long association with the old boom that they surely must have some kind of proprietary rights in the fine new boom which the Smith-Powers Logging Company built. Bernitt, as we have seen, even "considered" that they had and still have a one-half interest, but that is as far as he is willing to go. Neither he nor any other witness would testify that the agreement, original or otherwise, provided that the rafters were to have any rights of ownership. This we are asked to presume from the fact that the old books of E. B. Dean & Co. charged the raftsmen with a portion of the cost of construction in the "boom account." And we are asked to presume that their occupancy of the boom as raftsmen under this working arrangement established such legal possession as to defeat the rights of an innocent purchaser for a valuable consideration and compel him to pay twice for the same property, and at a valuation far in excess of its proven worth.

The decree of the court below should be reversed on the facts alone.

Respectfully submitted

JOHN D. GOSS

Attorney for Appellants

Herbert S. Murphy,
Of Counsel.

No. 2591.

**In The United States Circuit
Court of Appeals for the
Ninth Circuit.**

SMITH-POWERS LOGGING COMPANY, a Corporation, and C. A. SMITH LUMBER & MANUFACTURING COMPANY, a Corporation, }
Appellants,

VS.

E. W. BERNITT and VICTOR WITTICK, }
Appellees.

Appeal from the District Court of the United States, for the District of Oregon.

**SUPPLEMENTAL ANSWER BRIEF OF
APPELLEES.**

W. U. DOUGLAS, Marshfield, Oregon.

JOHN F. HALL, Marshfield, Oregon.

Solicitors for Appellees.

No. 2591.

**In The United States Circuit
Court of Appeals for the
Ninth Circuit.**

SMITH-POWERS LOGGING COMPANY, a Corporation, and C. A. SMITH LUMBER & MANUFACTURING COMPANY, a Corporation,
Appellants,

vs.

E. W. BERNITT and VICTOR WITTICK,
Appellees.

Appeal from the District Court of the United States, for the District of Oregon.

**SUPPLEMENTAL ANSWER BRIEF OF
APPELLEES.**

W. U. DOUGLAS, Marshfield, Oregon.

JOHN F. HALL, Marshfield, Oregon.

Solicitors for Appellees.

Appellants' Reply Brief is largely devoted to criticisms of appellees' brief, and it may perhaps

appear to be merited. The record, however, shows that appellants made no service of their opening brief until the 27th day of September and the trial of the suit was set for the 8th of October, 1915, thereby in effect allowing appellees but seven days within which to prepare, print, serve and file their answer brief, and this too in a case where the printed abstract alone includes at least 500 pages. Counsel for appellees therefore feel no disgrace in confessing to any imperfections that may exist.

The appellants' counsel laboriously but unsuccessfully argue that appellees have abandoned their original claims in this suit and have now switched to something else. Whether the original agreement is to be designated a partnership or tenancy in common, or what not, the question is, does the evidence and law support the decree? Even though there may be some uncertainty as to the classification of the contract, we find a long line of Oregon decisions cited on page 42 of appellees opening brief, supporting the rule that whether the relation of partners or co-owner exist, the rights of the parties are the same, and though the relations of the parties may be improperly characterized, an accounting will be proper if they sustain such relation to each other as that equity may assume jurisdiction.

Appellants also indulge in considerable criticism of appellees' statement of the facts set forth in their brief at pages 7 to 9, all apparently because it did not conclude with, possibly, these or similar words: "By reason of which they and their prede-

cessors were to, and did, acquire an undivided one-half interest in the booms and the right, franchise or easement to raft and boom logs upon the land." This criticism may be merited so far as the statement, itself, is concerned, but the Court has before it the pleadings, the evidence and the whole case to consider, not merely the statements of counsel. In order to appease counsel we would respectfully ask the Court to consider those words incorporated in the original.

Appellees do not call upon the Court to assume any facts in this case necessary to support the decree of the lower Court. They claim, however, that the evidence as shown by the record does justify the decree.

Appellants' objection at page 11 as to the language employed in appellees' brief at page 20 thereof, seems strained. True, it would be absurd for appellees to attempt to establish their case by reason of the bill of sale referred to, but the language used in that bill of sale (Exhibit 8) is certainly corroborative in that it shows at the time it was made (1884) what the parties Klahn and Bernitt had in their minds with reference to property rights in these booms.

The printed abstract does not show these various bills of sale that were introduced to be acknowledged, the reason for which is not apparent, as an inspection of the exhibits themselves, however, will establish that fact.

Because appellants' brief states appellee Bernitt

did not testify that the original parties had some interest in the booms, does not establish that to be the fact. Bernitt's testimony on pages 138-139 and Wulff's testimony at pages 135 to 138 of the transcript shows conclusively that they did so testify, as well as at other places in the transcript.

Appellants' counsel's simile as to the writer of appellees' brief being like a hen trying to hatch out door knobs is amusing, but to apply it in the manner he evidently intends one must be stimulated by an overheated imagination. The only things entering into this case that could be similarly characterized are the misleading conclusions, theories and statements contained in appellants' brief, made apparently in the hope that he will be able to muddy up the water and thereby cause the real issues and facts to be lost sight of.

Counsel challenges appellees to show where the testimony supports the statement that Dean & Co. was to have one-half interest in the booms and the rafters the other half. Appellees would again refer to the testimony of E. W. Bernitt at pages 138 and 139 of the transcript. He says that Merchant told him Young and Wulff were to take a half interest in the booms and tried to induce the witness and Klahn to go in and take a fourth, and let Wulff and Young have the other fourth. Possibly counsel will still insist that appellees should go further and indicate the words used and pages of transcript to show that Wulff and Young and Klahn and Bernitt did go into the enterprise. If so, attention is called to pages 135, 142, 143, and

155 of the transcript.

Question one, attempted to be set up by appellants in their reply brief is, did appellees sustain their burden of showing the original agreement made the raftsmen joint owners or cotenants with E. B. Dean & Co. in the real property? Other than the right to build, maintain and operate the booms thereon, appellees have claimed no title or interest in the land. The evidence just referred to above clearly establishes the fact that they entered upon the land at the solicitation of E. B. Dean & Co. joined in and contributed to the enterprise of building the booms with the understanding that they were to have an interest in them, and they, the rafters, have continued to operate them from 1881 to 1909, about 28 years.

The answer to their second question is given by the same evidence which settled the first.

In answer to the third question. The statute of frauds does not apply. The contract upon which this suit is based is an executed contract so far as appellees are concerned. There was nothing further for them to do in order to have their interest in these booms. Equity will not allow the statute to be used as a cover for fraud. (Appellees brief pp. 46 to 49)

Answering the fourth question. The facts disclosed by the testimony show the appellees have been in possession of the booms, exercising the very rights they now claim, i. e., that they have had exclusive possession for catching logs and

timber, and making up rafts of logs and exercising the sole right of taking the timbers therefrom to the mills, and maintaining and operating them for not less than twenty-seven years. That Smith did not have the property examined to see if anyone was in possession, and appellees were in actual possession at the time he claims to have purchased, and he continued to allow appellees to operate the booms as formerly for all of that season and also the next without controversy, (Appellees' brief pp. 50 to 60).

As to the fifth question, that of whether the ouster was in 1908 or 1909. It is conceded there is testimony to the effect that the appellant Smith-Powers Logging Company by A. H. Powers told appellees that it refused to recognize their claim some time in the fall of 1908. The old adage "Actions speak louder than words", may not be a quotation from any of the learned text writers, yet it is a common sense term to use in interpreting the acts, doings and sayings of men. This is applicable here because the testimony shows that these appellees did continue in the actual use and occupancy of the booms after such statement by A. H. Powers on behalf of the Smith-Powers Logging Company. They did enter into possession of the booms, catch logs therein, sort logs and raft logs therefrom during the fall and winter of 1908, and also the Spring of 1909, without objection on the part of the Smith-Powers Logging Company or any one else, but with its apparent encouragement, although appellants may have had men there also doing similar work (See reference to pages of trans-

cript given at page 81 appellees' answer brief). But after the work of the season was done and these rafters attempted to collect their portion of earnings, they were not only prevented from obtaining the money which their interest in the booms had earned for catching logs, but also for rafting the logs to the mills, not only logs going to the Smith mills but to the mills of the Simpson Lumber Co. as well. This then is the time when the actual ouster took place. If the appellants, after notifying them that they did not recognize their claims on the booms, had refused to permit the appellees to enter into the possession of the booms and work in and around them the same as formerly it might then be claimed with at least some small degree of probability that the ouster occurred in 1908. To illustrate, if these appellees should bring an action or suit involving the question of ouster, and should rely and base their action upon the statement of the appellants that they did not recognize any claim of appellees in the premises, but the evidence disclosed the fact that appellees continued to enter in and upon the premises at will and operate the same as formerly, certainly no court would sustain them in their contention of ouster if an issue were raised by a denial of it.

Answering question six. This would seem to have been answered at pager 82 to 84 inclusive of appellees' brief, but in further explanation we might add:

It is true appellees are claiming the use of the

booms after it is claimed they were repaired under the requirements of the government and government permits issued. This use, however, continued for about one season; at the end of that time the actual ouster took place in 1909 and the Court has allowed appellants to keep those booms with all the improvements, permits, etc., awarding appellees the paltry sum of \$1000.00 in lieu of their interest. Appellants, however, are not satisfied; they desire appellees should pay for half of those improvements too, with a result that they could bring appellees out in debt, thereby not only appropriating appellees' property and rights, but imposing apenalty in addition, for claiming an interest. They apparently want to go into a community and appropriate such property as they desire, and if the owners protest, punish them for protesting and claiming their own. As proof of this, counsel requests the Court to read paragraph XX of appellants' answer at page 61 of the transcript, and consider it in the light of this statement, together with the evidence submitted.

Their position, from any standpoint it can be considered, is unfair and inequitable. The evidence shows the improvements claimed to have been made by appellants were made without the acquiescence or consent of appellees; they were given no voice in the matter, either as to plan, cost, or anything else. It is obvious that at the time appellants began to make said improvement they did so with the purpose of ignoring appellees' interests. In other words, they had their feet in the trough

and proposed to occupy the whole of it and crowd appellees out, with just as much consideration for right and wrong and the interest of others as a hog at feed time.

Appellants have not introduced any evidence from which the Court could say what was necessarily spent by them in the improvements claimed.

But, supposing appellants did repair and enlarge the booms at an approximate expense of \$31,450.00 with the acquiescence of appellees, those additional improvements would not in equity belong to appellees until they at least satisfied appellants as to the cost of their half, nor would the fact that appellants had made them entitle them to ignore appellees' interest, so that at the time the actual ouster took place the question to be settled would be, *what was appellees' interest worth?* If they owned a half interest in the improvements or were liable for a half of their cost, the value would be a half of the \$31,450.00 added to half of the value of the old boom, to-wit, \$1000.00 as set by the Court. But if they had not paid for them and were not liable for them the value would be a half of the figure they were worth without those improvements. Accordingly then, if the Court should have found that the booms were worth \$33,450.00 with the improvements added, and that appellees should pay for half of the improvements or give appellants credit therefore, this \$15,725.00 deducted from the half of \$33,450.00, to-wit, \$16,725.00, would leave the \$1000.00, which is exactly the result of this decree.

This, however, is not satisfactory because appellants want not only to appropriate appellees' interest and all the improvements, but to compel appellees to pay for half of the improvements too. In other words, having spent \$31,450.00 on the improvements which they keep and claim as their own, and the Court having awarded appellees judgment of \$1000.00 for their half interest, they contend in theory the Court should go farther and also award appellants a judgment of \$15,725.00 against appellees, thereby leaving them \$14,725.00 in debt to appellants. For what? Because they dare raise their voice in protest against the taking of their property. This may seem like equity to some people with predatory instincts, but it will hardly pass in a Court of Justice.

It is somewhat refreshing to find that appellants concede, at page 21, the rule cited by appellees, that a tenant in common cannot enforce contribution if he asserts ownership of the entire title.

The text writer therein, Cyc, pages 53 to 60, is setting forth the rule as to contribution between tenants in common. He lays down the positive rule that a tenant claiming the entire title, cannot enforce contribution against his co-tenants. Appellants seek, however, to modify this by quoting another rule stated in the following language:

“Conversely, if he is called upon for an accounting of the rents and profits, he is to be allowed for advances properly made, etc”.

Conversely of what? By reading the preceding part of the sentence to which the above belongs, we

find the writer stating the rule that

“Where a tenant in common claims contribution from his co-tenants for improvements made by him, he must share with them the rents and profits received by him, and conversely, etc”.

Is not such an attempt puerile?

Appellants by their plea assume the defense that appellees have and had no interest in the property and claim they ousted them from possession in 1908. The Court finds the ouster took place in 1909 and awards them a portion of the earnings of the booms between those two dates. Appellants still denying title in appellees say, well we have spent a lot of money on the booms, and they must pay for half of the improvements. Under their theory, we have no interest, they keep the booms, yet we must pay for fixing them anyhow. Such a contention is ridiculous, and if successfully maintained in any degree would be worse than affording a common sneak thief protection in the enjoyment of his stolen plunder. It, in effect, imposes a punishment on appellees for attempting to regain what has been taken.

Appellants claim that this case is based on questions of fact, not of law, and then proceed to misstate the facts. Upon pages 19 and 20 of the reply brief they dwell emphatically and insistently upon what they claim to be a fact, that is that C. H. Merehant as receiver sold the entire property of E. B. Dean & Company, including the booms, to the Dean Lumber Company. Appellants have an

ulterior motive undoubtedly in making this claim. They wish to overcome the testimony of the appellees to the effect that they had possession of the boom properties at the time it is admitted that C. H. Merchant was receiver for E. B. Dean & Company. The question, however, of how the Dean Lumber Company acquired its title to this property is not in evidence. In the appellants' first brief we find a statement which was overlooked by appellees' counsel at the time of preparing their first answer brief. There at page 51 is contained the statement that Dean Lumber Company took title in the receivership proceedings from C. H. Merchant as receiver of E. B. Dean & Company about March 1903. The statement is that the witness C. F. Dillman so testified. That is unqualifiedly untrue, and an attorney as familiar with the chain of title to this property as the appellants' attorney is, cannot state such as a fact without presumably knowingly misstating it. A perusal of Mr. Dillman's testimony as set forth in the transcript on pages 464 to 467 will not disclose anything of that kind, neither will his testimony on file in this case. While it is not within the province of the attorneys for appellees to incorporate their testimony into this brief, they wish to insistently urge that such a statement does not appear in the record, and if it did appear, is untrue. Dillman testified that Merchant told him he had possession of that property as receiver. Dillman was appellants, witness and apparently a very much interested party. But the fact is that all the other testimony in the case of both sides show that these rafters and their

predecessors, at all times had actual possession of the booms. They operated them to the exclusion of all other persons, and the Dean interest never at any time sought to take actual possession and operate them. Under those circumstances, if C. H. Merchant as receiver had any possession, it was constructive, through and by reason of the actual possession of his co-tenants, these appellees.

Appellants' objection that appellees are unable to take a stand as to whether a partnership continued to exist on down through the many years which they had possession of the booms or not is unimportant. The Appellees have plead the facts in this case, and the testimony shows the facts. Those facts, in the opinion of appellees' counsel, support the theory of a partnership in the beginning, but whether the partnership continued one year or down to the time of the alleged ouster, or whether or not a partnership existed originally is not material. The material point is that the predecessors of the appellants induced these appellees and their predecessors to enter upon lands belonging to them and contribute and join with them in the construction of log booms upon the premises, with the understanding they were to have an interest in them.

Appellants also make the positive statement that Dean Lumber Company expressly refused to recognize the rights of ownership claimed by the raftsmen. That is also a misstatement of fact as there is absolutely no such testimony. Dean Lumber Co. never at any time gave out any such in-

formation to these appellees, and the most thorough search of the abstract and testimony will not disclose any such evidence.

Throughout their brief appellants continue to restate as a fact that C. H. Merchant as receiver, sold the property to Dean Lumber Company, and upon that false statement proceed to base many phases of their argument. It is true that subsequent to the purchase of the Dean & Co. property by Dean Lumber Company, appellees knew of it. But there is no evidence showing that appellees ever knew that the transfer covered their interest in the boom, nor that Dean Lumber Company claimed it did, nor were they even disturbed in their possession or management of it in the slightest. The evidence shows conclusively that they continued in their possession, operation and management of the booms the same as formerly. Then why should they question any transaction that may have taken place between the heirs of the members of the firm of E. B. Dean & Co. or even C. H. Merchant as receiver, and Dean Lumber Co. Under what rule of law then could appellees have been held to a ratification of a sale of their interest to Dean Lumber Co? Certainly there is none, except possibly the rule of might, so insistently sought by appellants to be applied in this case, and by corporations of like character in dealing with small private interests.

Appellants claim the booms had seen their day, and were getting in a worse state of repair each year. Even though this was true, does it justify

appellants in their attempt to unlawfully appropriate appellees' interest in them? It may be that the booms were getting older, but the testimony shows they were at all times kept in a sufficient state of repair to handle the business, down to the time appellants sought to increase their capacity. There is no testimony showing any material loss of logs and timber out of those booms until Smith-Powers Logging Co. began to tinker with them.

As to whether Mr. Ingram or other parties testified to his or their being in possession for Smith-Powers Logging Co. during the winter of 1908-1909, does not establish that to be a fact. Appellees saw men there at times, and at other times no one would be there but themselves and their crews. (Trans. pp. 447 and 448).

In conclusion, there is one important point which the Court took cognizance of. That is while appellants have conceded that they knew of appellees' claims to the booms in 1907 still Mr. Powers testified that he told appellees to go ahead and handle the booms for the season in the fall and winter of 1907 and Spring of 1908 as formerly. Whether Mr. Powers made such a statement to them is not material. If he did it certainly shows an acquiescence and acknowledgement of appellees' claims. It may be that if now permitted the witness would, in explanation, testify that he told them that before he knew of their claims, but the fact remains that the pleadings admit knowledge of the appellees' claims in October 1907. Paragraph XI

of Answer (pages 55 and 56 of Transcript,) and the testimony of the witnesses Mereen, Oren, Powers and Bernitt establish it to be a fact. Yet, regardless of such knowledge, appellants permitted appellees to continue in the possession, control and operation of the booms the same as formerly without interference until the end of the 1907-1908 rafting season in the spring or summer of 1908, and even permitted them to take possession of the booms and catch logs, make up rafts therein and raft logs therefrom down to the end of the following rafting season, the spring of, or beginning of summer of 1909.

Counsel becomes quite mellow and considerate in conclusion. He is willing to give appellees the benefit of the doubt and say the rafters did not intend to become grafters, but that they sincerely believe from their association with the old booms for so many years that they surely must have some kind of property rights in them. This is so conciliatory and generous that possibly if appellees were not compelled by the necessities of a strenuous existence to exercise their natural instincts of self-preservation, they might, in order not to be outdone in politeness and liberality, say: Take these booms, the result of twenty-eight years of our work and effort. Yes, take all our property, but don't say so unkind a thing about us.

In glancing over appellees' statement of the case as contained in their first brief, counsel finds that on page 3 it is stated that E. B. Dean & Company was to and did pay 25 cents per thousand feet board

measure, for saw logs and 1-8th of a cent per lineal foot for piles for its own timber caught and handled through the booms. The "1-8th" of a cent there referred to is an error. The Complaint alleges it to be 1-4th of a cent (Par. XIV, p. 8 Trans.,) and the Answer (Par. V, p. 51 Trans.) admits it. The testimony at page 149 of the transcript also shows that the price was 1-4th of a cent, and appellees would respectfully ask the Court to consider the original brief amended in that respect.

Counsel for appellees are still of the opinion that the lower Court's decree should be sustained.

Respectfully submitted,

W. U. DOUGLAS,

JOHN F. HALL,

Attorneys for Appellees.

United States Circuit Court of Appeals

For the Ninth Circuit

SMITH-POWERS LOGGING COMPANY,
a corporation, and

C. A. SMITH LUMBER & MANUFACTURING COMPANY, a corporation,
Appellants,

vs.

E. W. BERNITT and VICTOR WITTICK,
Appellees.

No.
2591

Petition for Rehearing

JOHN D. GOSS, Marshfield, Oregon,

Attorney for Appellants.

Filed

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United States Circuit Court
of Appeals
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No.
2591

Petition for Rehearing

I.

The appellants respectfully request a rehearing of the above cause for the following reasons:

The money decree herein was based upon two items:

1st. A one-half interest in the booms.

2nd. An accounting of the profits from the oper-

ation thereof. It is respectfully submitted that the first item is excessive because the court made no deduction or allowance by reason of the expense of changing the boom rendered necessary by the orders of the War Department.

It is further submitted that the amount allowed for profits is excessive because the court did not consider

1st. That the cost of catching and storing the logs was borne largely by the appellants;

2nd. The necessary repairs of the booms were borne by the appellants;

The booms came into possession of the appellant Smith-Powers Logging Company in July, 1907, and at that time a valuation was placed on them of \$2,000. The court below in its opinion says of this valuation:

“The estimate seems to have been fairly made, with a purpose of arriving at the true value, and not with any view that it should be self-serving in anticipation of the present controversy.”

Both this court and the court below find that the date of ouster was June, 1909. There was, therefore, an interval of two years between the date of the valuation and the date of the ouster.

During this interval and prior to the date of ouster, the War Department refused to permit the maintenance and operation of the booms in their then condition, and required appellants to split the booms and leave a portion of the channel of the river open and free to navigation. Of this the court below said:

“ This requirement imposed a large amount of expense for reconstruction. The plaintiffs were unable to meet the expense, and the booms with an open channel through them without reconstruction **would be rendered of much less value than in their original condition.**”

The cost of splitting the channel and meeting the War Department's requirements as a condition precedent to operating the booms, is fully set forth in the record, separate and apart from the expense of extensions and improvements, yet no allowance is made therefor. Obviously, a boom which the War Department would not permit to be maintained or operated was of little value to anyone. It was not for appellees or appellants to decide whether or not the change should be made. It was rendered imperative by the action of the Government. The change was completed before the appellees were ousted and at a time when the court finds they were

operating the boom, yet the court awards appellees half the **gross** income during that period. If the change had not been made there would have been no profits, for the boom could not have been operated. Nor was the change a betterment or improvement in any sense. The capacity of the boom was greatly lessened and after the change was made the boom was of less value than when it came into the hands of the Smith-Powers Logging Company. The record is replete with proof of these matters, the evidence being undisputed.

Disregarding, as the court says we must, the extensive improvements made by appellants, it seems manifestly inequitable to award appellees half the value of the boom as it was before the Government required it to be split, plus half the gross income, when the very income thus divided was made possible only through complying with the Government requirements.

Accepting the court's ruling that appellees were entitled to a half interest in the boom and that there was an agreement by which appellees were entitled to half the income, is it equitable to select one date as the date of ouster and then select a date two years earlier for fixing the value of the boom, without requiring appellees to comply with the very agreement which the court finds to be in existence,

by sharing a portion of the expense imposed by law and by such agreement, without which compliance the boom would have been valueless and could have earned nothing? No question of consent to or notice of making the change required by the War Department is involved, for the court finds appellees were in possession and were operating the boom during this period. The expense of making the change is clearly set forth in the record, as is the value of the boom had such change not been made, and we respectfully submit that this undisputed testimony has been wholly overlooked by the court.

II.

The agreement, as claimed by appellees, required that the appellees bear all the cost of catching, storing and sorting the logs.

The undisputed evidence is that they only contributed a minor portion of this work.

The cost of repairing and maintaining the boom was a charge against the gross profits, and no allowance is made therefor in the accounting upon which the decree is based.

Unless the booms had been greatly enlarged they could not have handled the logs; the cost of enlargement was all borne by the appellants, and no credit

is allowed them therefor either by way of rental, interest or otherwise.

We therefore respectfully petition this Honorable Court for a rehearing on these matters, that we may more fully present the same.

Respectfully submitted,

JOHN D. GOSS,

Attorney for Appellants.

STATE OF OREGON,)
COUNTY OF COOS.) ss.

I, John D. Goss, attorney for appellants in the above entitled suit do hereby certify that, in my judgment, the foregoing petition for rehearing is well founded, and that the same is not interposed for delay.

JOHN D. GOSS,

Attorney for Appellants.



